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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 578

MARK PITTMAN, a minor, by and through his Guardian Ad Litem, MILAN L. PITTMAN,

Petitioner,

vs

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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No. . . . . .

MARK PITTMAN, a minor, by and through his Guardian ad Litem, MILAN L. PITTMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petitioner, Mark Pittman, a minor, by and through his guardian ad litem, Milan L. Pittman, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment and the Orders of the United States District Court for the Northern District of California, Southern Division, granting a Motion to Dismiss(C. T. 62) and Dismissing the Complaint and Action and Quashing the Interrogatories and Notice of

Depositions. (C. T. 66).[1]

Opinions Below

Trial in the District Court was on issues of Law raised on Motion, re jurisdiction. The opinion of the District Court is set forth in Appendix C. The final Order of Dismissal of the District Court is set forth in Appendix D. (210 F. Supp. 763).

The opinion of the court below (341 F. 2d 739) is set forth and appended as Appendix A, and its judgment as Appendix B.

Grounds on which the Jurisdiction of This Court is Invoked.

1. The date of the judgment sought to be reviewed and the time of its entry is January 26, 1965. (C. T. 82).

2. Timely filed petition for rehearing was denied on April 19, 1965. Mr. Justice Goldberg granted an extension of time within which to file petition for writ of certiorari to and including September 16, 1965.

3. The statutory provisions believed to confer

1. The record as certified to this Court by the Clerk of the court below consists of two volumes, Volume 1, pages 1 through 74 is the Transcript of Record in the District Court; Volume 2 is the Clerk's Transcript of Record in the Court of Appeals and numbered pages 75 through 84; because the Transcripts are consecutively numbered all references herein will be to C. T..

on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 U.S.C. 1254 (1), and 28 U.S.C. 1651(a).

Questions Presented for Review

1. Where a nine year old child is wrongfully injured by a government againt under 28 U.S.C. 1346(b)(F.T.C.A.), and money damages result; and where by The United States Constitution the State law determines the nature, character and ownership of such property (damages) and in the child's state all damages from such injury to age 21 belong to the parents; and where United States and State Law forbid a child a valid 'claim' to to 'sue on his own' behalf, and deny him capacity or standing to do either; and where United States and State Law provide that the ONLY MEANS WHEREBY A MINOR CAN HAVE A HEARING IN COURT PRIOR TO AGE 21 is where someone acceptable to the Court Volunteers to act on his behalf PRIOR TO AGE 21, petitions the Court and is appointed Guardian ad Litem as an Officer of the Court itself; and where by law such appointment is a CONDITION PRECEDENT to any legally valid 'claim' of any nature being made on behalf of the child; and a volunteer finally does petition and is appointed as a guardian ad litem and concurrently makes and

files a 'Claim' in a Civil Action, (being the first time a valid claim can be and is made for such child and served on the government;); and said claim is by its nature an anticipatory claim for possible Future Damages of a permanent nature after 21, Loss of Anticipated permanent earnings after age 21, anticipated permanent medical expenses after age 21 (the parents being entitled by law to all damages to that time and not having pursued their remedy); In such case, assuming 28 U.S.C. 2401(b) applies, did not the 'claim accrue' to the minor within the meaning of 28 U.S.C. 2401(b) upon someone having capacity being legally appointed? And was not Civil Action on a 'Claim Accrued" timely filed within two years of it 'accruing' under 28 U.S.C. 2401(b) upon filing of the Civil Action on the Claim as provided in 28 U.S.C. 1346(b) so that the District Court had jurisdiction to hear and determine the case on its merits?

(a) Will not the refusal of the court to take jurisdiction result in a denial of due process and equal privileges and immunities afforded other 'persons' (under 28 U.S.C. 1346(b) who are not required by the very Court which refuses to take jurisdiction, to depend upon the volunteer action of a third person as a condition precedent to enjoying rights thereunder?

(b) Is not the government, which imposed the conditions precednet, estopped to deny BY ITS APPOINTMENT OF ITS OFFICER WHO HAS CAPACITY TO MAKE A CLAIM (WHICH CAPACITY DID NOT EXIST PRIOR TO SUCH APPOINTMENT) so a claim could not previously 'accrue'?

(c) Would not the refusal to recognize the foregoing act to create a 'delusive remedy' as to those dependent upon the voluntary actions of third persons because the Law required it, as opposed to those having a 'real remedy' who are not so dependent? -all in violation of due process and equal protection of the laws?

2. Where, under the facts in question no.1 the Complaint alleges TWO CAUSES OF ACTION, although not separately stated and said joinder is not demurred to, and one cause alleges that all of the injury suffered and damages resulting, past and future, arose out of Negligence in the performance of a CONTRACTUAL RELATIONSHIP, thus an action ex contractu; in such case, as to such action ex contractur, the measure of damages by state law being the same, does not section 2401(a) apply as to this being a Civil Action within the meaning of 1346(b) filed within six years of the date the 'cause of action' accrued as provided in 2401(a), as distinct

from 2401(b) applying to the common law tort action calling for filing a civil action within two years of the date the 'claim accrued'; so thereby the District Court had jurisdiction to hear and determine the suit on its merits with respect to the breach of a contractual relationship by 'wrongs' done by authorized government personnel.

3. Where by U. S. Regulation and State Law a 9 year old has no legal standing or capacity to either 'claim' or 'sue' on his own behalf, and is, for all legal purposes a 'chattel' of the parents and government; and where those persons whom the law itself designates to have authority to present petitions for appointment to act as court trustee and court officer on behalf of a minor REFUSE to so act for more than two years after an injury, and not until the actual petition for appointment and filing of suit, in such case;

(a) Does the trial court have jurisdiction of the subject matter and causes of action therein so as to afford the child a trial on the merits?;

(b) Under such circumstances, the government by its laws and rules being the cause of the lack of prosecution, doe 28 U.S.C. 2401(b) have <u>any</u> application at all other than to establish the 'claim' 'accrued' at the date of the

filings as PROVIDED BY LAW?; and

(c) Would the refusal to take jurisdiction be a denial of due process, denying the child equal access to the courts with others, in violation of Section 2 Article IV of the Constitution and the Fifth Amendment to the Constitution?

4. If plaintiff minor is denied a forum under 28 U.S.C. 1346(b) under any of the foregoing questions, does this not deny him due process as a 'person' under the Fourteenth Amendment with respect to those rights of property he would otherwise have when the right to 'claim' and the right to 'sue' on his own behalf would otherwise 'accrue' automatically upon attaining age 21; or, if sooner, then by judicial consent and appointment, upon having a guardian ad litem appointed?

5. Where said minor is one of a class of persons, all under a like legal disability all being under 21, and where some of those within the class could have access to the forum under 1346(b), DIRECTLY after reaching 21, whereas, others of the same class are denied access after age21 ; and where such access is a matter of constant variable, depending upon the unregulated matter of how many days older than age 19 a person is at time of injury, then does not

refusal to take jurisdiction constitute a denial of due process in that it denies to millions of children under age 19 at the time of an injury the same right other children have within their own class if they are past 19 but under age 21 at time of injury? And does this not deny equal privileges and immunities to 'persons' and 'citizens' within the same class? i.e., those under a like legal disability?

6. Where, berfore guardian is appointed, suit filed and a 'claim' made thereon, before an adversary proceeding commences, an attorney is requested to investigate and does so, and in the course of this consults with an attorney on the staff of the U. S. Attorney General and makes known all the facts, including, minority, legal disability, questions of venue, injury and damages; and where said attorney general undertakes to look into the law, does so and then represents to said attomey that where a minor is involved the law is like the state law and the minor has, himself, a right to act for two years after becoming age 21; and where the attorney relied on these representations as being 'expertise' and coming from the Department of Justice who represents all the people; in such case is not the government estopped to assert a statute

of limitations other and different than as represented which action is commenced within the represented period? (It is not intended to hereby admit that the application of 2401(b) in this case is proper in prior questions regardless of the question of estoppel).

7. Does the application of the Doctrine of Sovereign Immunity in a case such as herein, in and of itself violate due process in denying to a 'person' the privileges and immunities of other 'persons' similarly situated under like circumstances upon like causes of action for like injuries, even within the same class?

8. Petitioner relies also on the other questions necessary, incidental to or inherent in the foregoing questions.

Constitutional Provisions, Statutes and Regulations Involved

Involved are Article IV Section 2 of the Constitution; the Fifth, Tenth and Fourteenth Amendment to the Constitution, all set forth as Appendix E; Rules 17(a), (b) and (c) from the Rules of Civil Procedure for the District Courts of the United States (Act of Congress June 19, 1934, Ch. 6511) set forth as Appendix F; Section 376 Code of Civil Procedure, State of California (as amended Stats. 1961, Ch. 657, p. 1868, sec. 4); and Section 3300 of the Civil

Code of the State of California, (as amended Code Am. 1873-74, c.612, p.265, sec. 276); and Section 3333 of the Civil Code of the State of California, (Enacted 1872;-all set forth as Appendix G; From Title IV of the Federal Tort Claims Act, codified 1946, (60 Stats. 842-847, 28 U.S.C. 942 et. seq.); recodified 1948 (28 U.S.C., pertinent provisions sections 1346(b), 2401(b), and 2674, amended Sept. 8, 1959, 78 Stats. 471); all appended as Appendix H; Title 28 U.S.C. Ch. 161, p. 5085-United States as Party Generally, section 2401(a); appended as Appendix H, page 20.

STATEMENT OF THE CASE

The trial court had jurisdiction under 28 U.S.C. 1346(b), 28 U.S.C. 2674, 28 U.S.C. 2401(a), and 28 U.S.C. 2401(b); entertained and granted Petition for Appointment of Guardian ad Litem under Court Rules 17(a), (b) and (c), Chapter 4(C.T.10,12); Complaint forthwith filed (C.T.4). Defendant Moved to Dismiss and Quash (C.T.21, 24). The trial court made two Orders (C.T. 62,67), granting both Motions to Dismiss and Quash. The United States Court of Appeals had jurisdiction under 281 U.S.C. 1291.

FACTS

The judgments complained of are those

Dismissing the Action (C.T. 62.67) and Quashing; the facts before this Court are those recited in the Complaint (C.T. 1-9), Petition for Appointment of Guardian ad Litem (C.T.10-12), the Order appointing Guardian ad Litem (C.T.12), and the Affidavit in Response to Motion to Dismiss (C.T.40-49). None of the facts alleged were denied, therefore they are deemed true. United States v. Shubert, 348 U.S. 222, 225. There are three factual situations presented; although they affect each other they present separate questions of law. Appellant further complains of the Judgment of the United States Court of Appeals affirming the District Court (C.T. 82), and the grounds set forth in the Opinion therein (C.T. 78-81).

A. The First Factual Situation: From the Complaint and Petition:

1. July 13, 1959, Mark Pittman was a minor under 10 years of age (R.T. 10);

2. Mark lived with his father, Commander Pittman, mother, and three brothers and sisters in a house situated in the residential quarters for officers of the United States Naval installation at Vellejo, California, commonly known as Mare Island Naval Shipyard (R.T. 10, 5);

3. All of the roads, real property

facilities and their improvements, were under the direct operation, control and jurisdiction of the United States Navy, an arm of the United States Government (R.T. 5).

4. The QUARTERS AREAS WERE SPECIALLY DESIGNATED FOR RESIDENTIAL PURPOSES, the children, including Mark, played in that area; including the roads, alleys and by-ways. (R.T. 5,6).

5. Defendants knew this. All traffic conditions, including signs and routing, were under their control in this area (R.T. 6).

6. July 13, 1959, while Mark was playing in the residential area, a Navy motor vehicle driven by an authorized driver drove through the residential area and struck Mark (R.T. 6). That there were three, concurring, contributing causes of the accident, and consequent injuries (R.T. 6, 7). That the causes were:

(a) The United States Navy as a landlord so negligently supervised, managed and controlled the physical area, in failing to provide signs, warnings and supervision, knowing children played in the area (R.T. 6);

(b) Knowing children played in the area and roads, defendants were careless and negligent in routing motor vehicular equipment through the quarters (R.T. 7);

(c) That the driver of the vehicle was careless under all the facts and knowledge (R. T. 6, 7).

7. Three separate duties are alleged and the particulars wherein each was breached (supra), including common law negligence and negligence arising out of contractual relationship of landlord and tenant; further alleging injury, damages and proximate cause;

8. The complaint seeks recovery for the child for FUTURE medical, Future suffering; and Future loss of earnings (C.T. 4, 5 and 6 (prayer)), all with regards to his Future Life Expectancy.

9. No previous Guardian ad litem has been appointed (C.T.11).

10. Guardian ad Litem first appointed December 18, 1961 - 2 years and five months after the wrongdoing occurred (C.T.12).

11. Complaint filed on same date of appointment (C.T.1).

12. No prior 'claim' by one having capacity is ever disclosed as having been made on behalf of Mark; No prior 'claim'as a parent on behalf of himself is disclosed by the Guardian (the father).

13. Service of the 'Claim' in the action was December 20, 1961. (C.T. 13-reverse side).

B. The Second Factual Situation; The Affidavit. (C.T. 40-50).

1. Affidavit filed in response to Motion to Dismiss. (C.T. 40-41).

2. Commander Pittman originally interviewed by affiant September 11, 1960, more than one year after the accident. Nothing had been done by the parents for themselves or the boy. From the time of the original interview and at all times, it was made clear (C.T. 42) that Commander Pittman and his wife had several children; the Navy was his career; he had the responsibility of supporting all and providing for the future of all; he intended personally to make provisionf for Mark to the best of his ability; for the sake of all, including Mark, he could not permit litigation to even possibly, detrimentally affect his career, because that was where the security of his family, including Mark, lay. His primary concern was as a husband and father to all, not to Mark alone; that, therefore, his "first consideration" with respect to litigation would be the possible affect on his career and earnings. As between a 'possible' recovery and career security, there was no choice in the course he had to take.

3. January 12, 1961, Commander

Pittman actually signed the Petition (C.T. 11, 12), which was with the Complaint which he read.

4. But, because of his fears, he directed the Complaint should not be filed until a determination was made on his selection for promotion to Captain.

5. As a result, the Petition, Order and Complaint were filed at the times shown. THIS WAS AFTER HE WAS MADE CAPTAIN AND INSTRUCTED THEY BE THEN FILED. Even this consent was based on his then belief that litigation would not thereafter affect his career because further promotion in his particular branch of the service was highly improbable.

C. The Third Factual Situation: From the Affidavit. (C.T. 40-50).

1. That the Commander's attorney had sought information and advice from the United States Deputy Attorney's office in Los Angeles, advising a particular Deputy of all the facts above, and had inquired with respect to the statute of limitations, venue, damages, etc.

2. That the United States Deputy Attorney in several calls had advised affiant that there was a disability provision, that the statute was a two year statute plus the disability provision.

3. That affiant relied thereon in the handling of the matters involved.

4. That the attorney had even read to affiant the law and explained the meanings of the sections involved, and affiant relied upon this as upon the word of an expert.

FACTS WHICH ARE MATTERS OF JUDICIAL NOTICE

From "STATISTICAL ABSTRACT OF THE UNITED STATES, 1962", United States Department of Commerce, Bureau of the Census, NATIONAL DATA BOOK AND GUIDE TO SOURCES, 83rd Ed.

The 1960 population of the United States comprised 183,285,009 persons.

Of this amount 108,861,000 were over the age of 21.

74,424,009 were, therefore, under the age of 21.

THUS, MORE THAN 40% OF THE POPULATION CONSISTS OF "PERSONS" UNDER AGE 21.

The projection statistically made at page 6 indicates that the percentage of those under 21 will increase between 1960 and 1970.

Page 6 disclosed that in 1960 there were 20,318,000 children under 5 years of age; 18,789,000 5 to 9 years of age; 16,985,000 be-

tween 10 and 14 years; and 13,424,000 between the ages of 15 and 19 years. Thus, it is a subject of judicial notice that the percentage of the population consisting of those under the age of 21, will be consistently increasing in the future. There are 5 years involved in those within the 15 to 19 bracket. Taking 20% of the 13,000,000 figure for those 19 years of age, there were approximately 2,7000,000 19 year olds at the time the cause of action alleged in the Complaint in this case took place. Taking the 11,137,000 20 to 24 years of age, covering a 5 year span, and taking 20% of that figure, we find there were approximately 2,220,000 20 year olds at the time the causes of action set forth in the Complaint herein took place.

The Statistics Establish the Following Judicially Noticeable Facts:

1. More than 74,000,000 persons are denied a remedy granted by law to the rest of the population on the same basis as the rest of the population; in that such 74,000,000 people are denied equal access to the forum on the same terms and conditions and are dependent upon the whim, caprice, self-interest or good nature of some third person to enjoy the legal rights the others have independent of third persons. Plain-

tiff minor is within this group.

2. Within the class of 74,000,000 there are variations of inequality of access to the forum, and remedy. There are 4,220,000 persons within the class of minors, but between the ages of 19 years and 21 years. The direct access to the remedy as to those is unequal, depending entirely upon the age of the child when the wrong occurs; thus-if 19 years and 6 months, he will have 6 months after age 21 for direct access to 'claim' or 'sue' for himself; if 20 years and 11 months-he will have 1 year and 11 months to 'claim' or 'sue' on his own behalf. The amount of time available to such minor for direct access on the same basis as the majority of the population, (for a minor over 19 when the wrong is done), varies in direct proportion to the closeness of the date of the wrong to his 21st birthday; and the resultant inequality within a class of persons (19 to 21) within a larger class (all minors) varies directly on the same basis. This is based upon some opinions of the application of 28 U.S.C. 2401(b) for which review is herein sought.

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING THE SAME.

Certiorari Should Be Granted Because The Courts Below Have Denied Petitioner Access To A Statutory Remedy On A Discriminatory Basis. By Deciding A Federal Question In A Way In Conflict With The U. S. Constitution and Applicable Decisions Of This Court And In Conflict With Applicable State Laws And Thus Have Raised The Question Never Passed Upon By This Court.

Where a minor child is injured by wrongs of a government agent, under 28 U.S.C. 1346(b) (The Federal Tort Claims Act), and "Money Damages" which may last to age 21 result from such injury to the child, and such 'Money Damages' may, contingently endure past age 21 and permanently (subject to proof); whether the words of a statute of limitations (28 U.S.C. 2401(b),(assuming it to be the applicable Statute of Limitations) are to be so arbitrarily disregarded and other words substituted so that the statute is the interpreted and applied in denying access to a remedy to the legally constituted officer acting for such child's future, contingent damages, as to ivade the right of a state under the Constitution to determine the nature, character and ownership of a property right, to conflict with and

thereby invalidate applicable state statutes and law and thus arbitrarily discriminate so as to:

(a) Deprive all minors including plaintiff, (comprising 40% of the population, over 74,000,000 people) of the equal protection of the laws and the privileges and immunities of other persons similarly situated;

(b) Deprive all minors between 19 and 21 years of age (being a class of 4,200,000 within a class) of the equal protection of the laws on a variable, discriminatory basis;

(c) Deprive the parents of injured minors their property rights to the damages during such infancy under applicable state laws; and

Thus made such remedy under 28 U.S.C. 1346(b) a delusive remedy on a discriminatory, unequal basis as to all persons so affected?

The First Factual Situation is set forth in STATE OF THE CASE, A Above. It will only burden the record to repeat it.

The defendant's real motive in his Motion to Dismiss and Quash (C.T. 21 et seq) is found buried in his argument at lines 13 to 15 inclusive (C. T. 57):

> "Certainly, he" (i.e. the father of the minor child who was injured) . . . "should not now be allowed to have the

benefit of both the promotion and the possibility of recovery . . ."

The defendant's Brief filed in the Court of Appeals discloses the same type of reasoning, as the real basis of objection of the United States Attorney General to the District Court taking jurisdiction; at several places, as follows:

Page 8. "The district court was available at all times to minor Pittman's father during the two years following his" . . . (assuming this to be the child's) ..."purported injury . . . and suit could as readily have been brought by him then," (assuming this to refer to the father being able to bring suit) . . . "as it has been now."

Page 8. "The delay was not occasioned by any legal disability on the part of the son, but merely by the inaction of the parent."

At Page 9, the defendant's Brief misstates the legislative history of the Federal Tort Claims Act, including the alleged Congressional intent, commencing with ". . . that the legislative history . . . reflects the policy of Congress . . . "for short periods of time to bring suits in tort:

"Plaintiff (appellant's) theory, which would enable . . . a minor, wholly at his own pleasure or convenience, to wait up to 20 years (or more) before filing a suit would thwart the Congressional policy and intent."

"It is apparent that the Congressional conclusion that a reasonable defense is possible only when the actions are brought within two years of the time when the cause first accrues, and a suit may be brought, is a sound one. See H. R, 1754, 80th Congress, 2d Session p. 4 Cf. Hearings before Subcommittee No. 1 of the House Judiciary Committee on H.R. 7236, 76th Cong. 3rd Sess., 21."

Because this type of representation apparently has been made by the United States Attorney General ever since the Federal Tort Claims Act was passed, appellant could not properly respond to such representations to the Court without having a copy of the House Resolutions referred to. House Resolution 1754 also referred to, is totally irrelevant, since it amends the National Labor Relations Act.

Appellant prays that this Court bear with him because of the importance of the matters

involved in this explanation. Appellant tried to find a copy of House Resolution 1754 in all the law libraries in Los Angeles, one in San Francisco, without result. Appellant found the Government Printing Office had no copies, it was out of print; the sub-committee involved, of the Judiciary, had no copies available; the House Judiciary Committee had no copies available. Appellant found one in the Reference Room at Doheny Library; the only one. Appellant, realizing this situation could extend elsewhere, has had the one copy photostated and is forwarding 41 copies to the Clerk of the United States Supreme Court for the convenience of the Court for reference (this is not intended to be an outside Brief, and since the validity of the House Resolution Hearings are not in question, it could not be appended as an Appendix); appellant further is sending three copies each to the Solicitor General and to the proper Deputy Attorney General for the convenience.

The opinion of the court below rests squarely upon the same error as was the basis of the defense; thoroughly confusing (C.T. 79) the word "claim" and "claim accrues" contained in U. S. 2401(b) as quoted by the Court, with "the cause of action" recited in the fourth

paragraph on the same page, holding "We hold that the cause of action belonged to Mark and not his guardian ad litem, "and further" that the "cause or claim accrued at the time of the injury . . ." (Emphasis added in each particular.)

At C. T. 80, the Court accepted the allegations of the defendant's Brief, (as recited above): "Congress was alarmed about stale claims when it passed the Act . . ."; an additional reason why appellant has had copies made of the House Resolution which clearly shows no such alarm, but shows the real purposes of the Act.

Plaintiff asserted the legal contentions and positions relied upon herein, in the alternative, as well as cumulatively. The appellate court did not rule on the basic constitution issues raised which are presented here for determination; however, by its ruling and judgment, Appendix A and B. supporting the DISMISSAL of the District Court and its ruling (Appendix C and D), the judgment of necessity violates the Tenth Amendment to the Constitution, Article IV Sec. 2 of the Constitution, the Fifth Amendment to the Constitution, and the Fourteenth Amendment to the Constitution (all set forth pertinently in Appendix E); it violates the

REGULATIONS INVOLVED (Appendix F), with respect to capacity and infants in the Rules of Civil Procedure for the United States District Courts, destroys the legally established property rights under state law (Appendix G - the pertinent provisions of the state statutes involved having relation to who owns money damages), and substitutes words and phrases in a United States statute (Appendix H) which are not set forth in such statute; indiscriminatorily denying a minor a remedy on an equal basis with other persons.

As a matter incidental thereto, the court below imposes an entirely new construction, purpose and intent for 28 USCA 1346(b) at C.T. 80, where, in violation of the applicable decisions of this Court that the Federal Tort Claims Act should be liberally construed, the court gives a strict construction to the same, and a narrow application where it states "We think that may be true as to what injuries are within the act." Such statement is without historical, judicial or legislative precedent.

A. U. S. Statutes with Respect to Jurisdiction, Government Liability and the Limitation of the Remedy, and their Construction:

The pertinent parts of the statutes involved for purposes of this first ground for Certiorari,

are:

1. 28 U.S. C. Section 1346(b) (Appendix H). This confers exclusive jurisdiction upon the District Courts over "civil actions on claims ... for money damages; ... "under circumstances where the United States as a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

2. An additional section having reference to liability of the United States is 28 U.S.C. Section 2674 (Appendix H), which was originally found as the sentence immediately following 28 USC Section 1346(b) but was codified under a different heading in Title 28, the pertinent parts of which read:

> "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ."

3. Assuming, for purposes of this Certiorari, that USC 2401(b) is the applicable statute of limitations with respect to the foregoing, (Appendix H), the pertinent parts (as found in Title 28 in the Code, but not found in that way in the original statute (60 Stat. 845, Section 420) reads:

"A tort claim against the United States

shall be forever barred unless action is begun within two years after such claim accrues ..."

The statutory words and phrases with respect to jurisdiction, definitions of the property rights involved, and words of assumed limitation, all lend themselves to ready definition, and application. Appellant respectfully directs the attention of this Court to the language in 2401(b), the determinant for application of limitation, which raises the question of when "a claim accrues". This is the essence of this appeal. There is no reference anywhere to a "cause of action", accruing or otherwise whether in 2401(b), 1346(b) or 2674.

This Act in its entirety was without historical precedent. A reading of House Resolution 7236 discloses its objects were:

1. To relieve Congress of all private petitions and bills for relief for claims for "money damages" and substitute the United States District Court as the forum;

2. To give all private persons, on an equal basis (there being no discussion of them being on an unequal basis anyplace) for each and simple access to the courts;

3. To eliminate relief IN ANY MANNER depending upon a committee or politics (page

6);

4. To give the poor, injured person the same right as the "big ship owners," "contractors" and "tax payers" - page 6.

5. The right to be exercised as under the Acts having application to "contract cases" - page 12.

Although said by an Assistant Attorney General testifying as a witness, and no evidence of Congressional intent, at page 16, Mr. Holtzoff states:

> "The basic principle on which this legislation is predicated is that of relief in respect of tort claims against the government as in respect to other claims, and are not to be a matter of grace from the legislative branch, but it ought to be a matter of right, just as it is between one private individual and another."

It must be noted in passing that nowhere in this House Resolution can be found a statement by any congressman who was a member of the subcommittee (as distinct from an Attorney General who stated the position of their office) that there was any statute of limitation intended to apply to a "civil action" in a district court for money damages in excess of $1,000, with respect to minors. The sole item is the testi-

mony of a deputy attorney general at p. 17 (where members of the Congressional Committee point out that the Department of Justice's attitudes and actions with respect to claimants has not always been of the fairest) pertains to $1,000 Administrative Claims.

As this Court itself has stated on several occasions, first in U.S. v. Yellow Cab Co. 340 U. S. 543 (1951) at page 547:

> "The Federal Tort Claims Act waives the government's immunity from suit in sweeping language."
>
> At page 548: " . . . the words 'any claim against the United States . . . on account of personal injuries are broad words in common usage. They are not words of art.' (Cf. the opinion of the Court below at C.T. 80 stating "there are decisions that may say that the Act should be liberally construed. We think that may be true as to what injuries are within the Act."

The Supreme Court continues,

> "This Act merely substitutes the District Court for Congress as the agency to determine the validity and amount of the claims."
>
> "The bill became Title 4 . . . at a moment when the overwhelming purpose of

Congress was to make changes of procedure which would enable it to devote more time to major publications . . ." relieve Congress of pressure, private claims, and another purpose to reflect the "general trend toward increasing the scope of the waiver by the United States of its sovereign immunity from suit . . ." then the Court ". . . it is inconsistent to whittle it down by refinements."

Chief Justice Warren set forth the rule for construction of this Act in Richards v. United States (1962) 82 S Ct. 585, 369 U. S. 1:

> "The tort Claims Act was designed primarily to remove the sovereign immunity of the United States from suits in tort, and, with certain specific exceptions, to render the government liable in tort as a private individual would be under like circumstances."

At page 7: "congress is waiving the immunity of the government for tortious conduct of its employees, could have imposed restructions and conditions on the extent and substance of its liability."

At page 13: "In the absence of persuasive evidence to the contrary, we do not believe that Congress intended to adopt the inflexible

rule urged upon it by petitioners."

At pages 13 and 14: "Nor are we persuaded . . . the liability of the United States is not co-extensive with that of a private person under state law."

Chief Justice Warren having previously stated that it is necessary that the statute be read as a whole, "with due regard to its purpose, requires application of the whole law of the state where the act or omission occurred."

As this court stated in a non-FTCA case, but one where sovereign immunity was waived, RFC v. Menahan Corp. 312 U.S. 81 (1941)

"Starting from a premise indicated in the Keifer case that waivers by Congress of governmental immunity from suit should be liberally construed - that being in line with the current disfavor of the doctrine of governmental immunity . . ."

There is no question that this Court holds this Act is to be liberally construed; to like intent are holdings of other courts: Somerset v. United States (1951) 193 F. 2d 631, it was stated:

"THE ACT (38 U.S.C. 1346(b)) MUST BE GIVEN A LIBERAL CONSTRUCTION TO WARD OFF THE OBVIOUS EVIL WHICH THE ACT WAS PASSED TO PREVENT - THE CUMBERSOME AND UNWIELDLY PRACTICE OF SEEK-

ING RELIEF IN CONGRESS BY PRIVATE BILLS." (Emphasas added).

In Jones v. United States (1954) 126 F. Supp. 1010 the court stated:

> "In construing the Federal Tort Claims Act it must be borne in mind that it is a remedial statute intended to waive the sovereign immunity of the United States to suit in tort. Unlike the other statutes that submit the United States to suit, the Federal Tort Claims Act should receive a liberal construction in the light of its beneficient purpose."

So, too, in McNamara v. United States (1961) 199 F. Supp. 879, the court stated: "THIS STATUTE (F.T.C.A.) SHOULD RECEIVE A LIBERAL CONSTRUCTION."

B. By Constitutional Provision, and Judicial Application of the Same, the State Determines the Nature, Character and Right to Determination of Real and Personal Property.

The judgments of this Court are uniform for at least 155 years, and the foregoing is an accurate statement of the law. The Constitution of the United States and the Tenth Amendment (Appendix E) is applicable. Mager v. Grima, et al. 49 U. S. 490 (1850) Justice Taney at page 493:

> "Now the law in question is nothing more than an exercise of the power which

every state . . . possesses, of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted . . .; and prescribing who shall and who shall not be capable of taking it . . . a state may deny the privilege altogether . . . it may annex to the grant any conditions which it supposes to be required by its interest or policy."

A hundred years later in 1950, in United States v. Burnison, Justice Reed, in effect, stated the same thing, in citing the 1876 case of United States v. Fox, 94 U. S. 315:

(At page 91) "The United States would have no semblance of a claim here were it not for wills probated under California law. The Fox case (supra) is only one OF A LONG LINE OF CASES WHICH HAVE CONSISTENTLY HELD THAT PART OF THE RESIDUE OF SOVEREIGNITY WHICH IS RETAINED BY THE STATES, A RESIDUE INSURED BY THE TENTH AMENDMENT, IS THE POWER TO DETERMINE THE MANNER OF TESTAMENTARY TRANSFER OF THE DOMICILIARIES PROPERTY AND THE POWER TO DETERMINE WHO MAY BE MADE BENE-

FICIARIES."

(At page 93) "We shall not overrule the Fox case, and of course we find no distinction between realty and personalty. Within broad limits, the state has power to say what is divisible and to whom it may be given."

The foregoing has immediate application to the instant case on appeal.

Referring back to Section 1346(b), and "a claim for money damages", there is no question but that this is a right in property. As such, the question of who is entitled to such right is a matter for state law. Who "ownes" the right is a matter of state law.

Section 1346(b), again provides that the "claim for money damages" for wrongs or injury, shall be in accordance with the law of the state where the act or omission occurs; see also cases cited above. Section 2674 in delineating the government's liability, goes further and provides that not only shall the government be liable under the same circumstances as a state, but in a like manner as the state. The phrase "in like manner" has never been construed in any opinion the appellant found under the annotations of 28 USC 1346(b), 2674, 2401(a) or (b). As a matter of definition

it is obvious that the phrase adds to and does not qualify or limit the phrase "under like circumstances."

Assuming 2401(b) to be a statute of limitations with respect to a "claim accruing," and since such a claim is a claim for "money damages" under 1346(b), the determination of when such a claim accrues, capability or capacity to have such a claim accrue, is a matter of substantive law within the state wherein the act or omission which occasioned the injury giving rise to the claim for money damages occurred.

Whether a matter is a "claim" and to whom its ownership "accures" must be found in the law of the state, these being matters of substantive right and not merely of limitation.

The word "claim", the word "accrue" in the phrase "claim accrues" are ordinary words of ordinary meaning, capable of being defined and reasonably applied without the necessity of distorting them. They have been repeatedly defined.

Webster's New International Dictionary, 2d Ed., Unabridged p. 493, "claim" as a noun: "a demand of a right or supposed right; a calling on another for something due or supposed to be due; "a right to claim something."

If the word is used as a noun then there must be a "claimant". And at Webster's page 493, this is defined as "one who claims; one who asserts a right or title". As examples, at page 494, of the meaning of a claimant in law, we find: that a party in an action asserting a claim is a claimant.

As a verb, Webster's New International Dictionary, 2d Ed., Unabridged, page 493, shows that "claim"as a verb is a word of action: "to ask for, or seek to obtain, by virtue of authority, right, or supposed right; to demand as due"; "to assert as a fact, right, or relation which ought to be acknowledged or conceded"; "to ask or call for; to require; to demand; to be entitled to"; . . . "to assert, maintain; -- a loose use. Colloq."

As a verb intransitive, it is defined as "to call; to call or cry out", or "to deduce a right or title; to have or assert a claim".

As a synonym it is "claim, assert, maintain".

In the authoritative WORDS & PHRASES, Vol. 7, "CLAIM" is defined:

> "A claim is, 'in a just juridical sense', a demand of some matter of right made by one person upon another to do, or to forbear to do, some act or thing as a matter of duty."

Citing many cases, including Prigg v. Commonwealth, 41 U.S. (16 PET.) 539, 615, 10 L. ed. 1060;

United States v. Spaulding, 13 N. Y. 357, 360 3 Dak. 85; and others.

"in its ordinary sense, a 'claim' imports the assertion, demand or challenge, of something as a right . . ."

Fordyce v. Goodman, 20 Ohio St. 1, 14.

Volume 1, Bouvier's Law Dictionary, 3rd Ed. at page 501:

"Claim" "In a popular sense, claim is a right to claim. The assertion of the liability to the party making it to do some service or pay a sum of money."

At page 502,

"Claimant" "A person authorized and admitted . . . etc. (Reference to a claimant, for example, in admiralty practice. There is no other example given.)"

FOR A CLAIM TO BE MADE LEGAL CAPACITY IS REQUIRED

Inherent in the legal and ordinary meanings of the word "claim" as a noun, are several factors. These include the capacity of the claimant to make a claim; for, without a claimant there is no claim. A discussion of

the capability of a claimant to make a claim, as a condition precedent to the existence of a claim, is found in Kocourek, JURAL RELATIONS, 2d Ed., page 7 with introduction by Wigmore (published by Bobbs-Merrill Co.) He states:

> "A claim is a legal capability to require a positive or negative act of another person; an immunity is a legal capability to prevent a positive or negative act of another; a privilege is a legal capability to decline an act toward another; and a power is a capability to act with a legal effect toward another."

Continuing at page 10:

> "5. There are only two ultimate jural relations. (1) Reciprocation - According to the above table there appear to be four fundamental types of jural relation, but a closer examination of the matter shows that there are in fact only two fundamental types -- claims and powers." "Immunity is only the reciprocal of claim, . . ."

Continuing at page 15, Section 8:

> THERE ARE ILLUSTRATIONS
> IF ONE HAS NOT THE POWER TO MAKE A CLAIM THEN THERE IS NO CLAIM --

Since the power to compel performance in the courts is fundamental to the claim. A claim implies the freedom and power to exercise the same.

FOR A CLAIM TO BE MADE, THERE MUST BE SOME WORD OR ACT SHOWING, AN INTENT TO MAKE A CLAIM.

In Cable v. United States, C. C. A. ILL. 104 F. 2d 541, 545, it was held that to constitute a claim within the World War Veterans Act there must be words showing an intention to claim in order to constitute a claim.

Where a letter did not advise that a claim was being presented or asserted, it was held not to be a "claim" under the War Risk Insurance Act.

Cannon v. United States D. C. Pa. 45 F. Supp. 106, 108.

Vol. 1, Bouvier's Law Dictionary 3rd Ed., at page 111, the word "accrue" . . . "TO BECOME A PRESENT RIGHT OR DEMAND . . ." That it is to say, a claim accrues after such claim has become A PRESENT RIGHT OR DEMAND. For example, a cause of action accrues at the time suit may be brought for a breach of contract. This example is set forth as an example of the word "accrue".

"A claim accrues when it may be made the basis of a judicial action".

Tessier v. U.S.C.A. Mass. 269 F. 2d 305, 309 (overruled, but not on this point, by Hungerford v. U. S. (1961) - which held a claim accrues when discovered or should have been discovered .... i.e. - BY THE PERSON INJURED. Tessier held it accrued when the wrong was actually done - being co-equal, in that case as the time when it could have been the basis of judicial action.

At 309 - continuing - a 'claim accrues' when a private person similarly situated would become suable under the law of the state."

Words and Phrases, Vol. 7, 497.

"For purposes of determining timeliness of filing a claim or notice of intention to file claim against the state, a claim is not deemed a 'claim accrued' until extent of damage can be ascertained. The words 'claim accrued' having same meaning as 'damage accrued' and not being identical with 'cause of action accrued.' Moltion v. State, 84 NYS 2d 521, 526, 193 Misc. 850. See also next case p. 497.

These are the only cases in Words and Phrases on "claim accrued."

The State of California has determined who has the ownership of damages accruing consequent upon injury to a minor (Appendix G referring to Section 376 of the Code of Civil Procedure. The parents own all of the damages for injury to a minor child which accrue between the date of the injury and the date the child reaches age 21, unless the child dies before that time. The law is well stated in Scott v. McPheeters, 33 C. A. 2d 629, 92 P. 2d 678, re hearing denied 33 C. A. 2d 629, 93 P. 2d 562, that, a parent is authorized by this section to maintain an action for the injury or death of a minor child caused by the wrongful act or neglect of another person. And, in Finnerty v. Cummings, 132 C. A. 48, 22 P. 2d 37 - where the usual relationship of parent and child exists, the parent has the right to recover for loss of the injured child's earnings and they belong to the parent.

The only exception in California law where there is an express waiver by the parent in favor of the child. See Girard v. Irvine 97 C. A. 377, 275 P. 840; If, in the same case, a parent sues as guardian ad litem and fails to distinguish between the parent's portion of the recovery for damages to age 21, and the child's portion for damages accruing after age 21, in

such case the parent again waives in favor of the child at such time as suit is commenced.

Without question, under the substantive law of California, in accordance with the constitutional provisions giving the right to the state so to do, the parents in this case had the sole ownership of any "claim for money damages" under 1346(b) and therefore were the only ones affected, if affected at all, by Section 2401(b) from the date of the injury until at least the date suit was commenced. It is agreed that by reason of the parent not having sued sooner, for purposes of this appeal, that the right to the damages under the claim owned by the parent was outlawed after two years had passed and the parents failed to act on their own behalf. However, that is not the question in this case.

Under the laws of the State of California, there is an immediate claim for money damages which immediately accrues by reason of the state law. Then, there is a contingent, possible, anticipatory claim. This depends entirely upon three situations:

1. That the injury continues to age 21 and that money damages accrue after age 21.

2. That the child lives to age 21; or

3. That the court acting as the true guard-

ian of the state on behalf of the child, by legal fiction, lend a "trustee" in the form of a guardian ad litem to the child, this making available someone vested with legal capacity to act. However, until such person is appointed, the child has no legal capacity, can not make a cla m, and a claim cannot accrue since as above, the claim cannot accrue until the damages accrue, and his right to a claim cannot ever accrue at the instant of suit because the damages that he may be entitled to recover can only accrue if he lives to age 21, or by special permission of the court he is permitted an opportunity to, by evidence, establish that the damages might accrue after age 21.

As is well stated in Davis v. Robinson, 50 C. A. 2d 700, 132 P. 2d, 894, a cause of action "arises" at the time of injury or wrong-doing, b ut "accrues" when the party who OWNS IT is entitled to bring and prosecute an action thereon. See also Smith v. Minnesota Ins. 86 C. A. 2d 581, 195 P. 2d 457 to the same effect, however, whether a cause of action may accrue to a minor under California law, is not involved, excepting that the court below, in error, confused cause of action accruing with claim accruing. Again,

in California, in Edgar v. Citraro 112 C. A. 183, it was held the cause of action for financial loss resulting from a minor's injuries belonged to the parents.

Much effort has been devoted to distinguish between "claim" "civil action" and the ownership of the same.

In California, a child cannot "own" a right of action - it is a property right, unless the statute so holds. L. A. County v. Metropolitan Casualty Ins. Co. 135 C. A. 26, 26 P. 2d 699 27 P. 2d 914.

As Pomeroy states in "Remedies and Remedial Rights" at Section 462 et seq "an action consists of a right belonging to one party . . . etc." Ownership of the right is inherent.

And in the authoritative Cal Jurs. 2d Vol. 1 p. 574, with respect to right of action, "There is a marked difference in a legal sense between the 'cause of action' or ground for legal relief, and the 'action' or proceeding in which that relief is sought. The 'cause of action' is also to be distinguished from 'remedy' which is the means whereby the action or the corresponding obligation is effectuated, and from the 'relief' which is the result obrained by the remedy. Remedy refers

to the method whereby the action is brought, and 'it is neither redress nor relief.' "

A right of action is a "perfected or accrued cause of action" at page 576.

"A cause of action does not 'accrue' until the party owning it is entitled to begin and prosecute a legal action thereon, that is, it accrues at that moment when he has a legal right to sue on it." (Citing cases) (Page 576). Then again, "a right of action is the right to bring suit in a case ..."

With respect to the words "civil action", it is commenced by filing a complaint; statutes 1850 Chap. 127 p. 343:

> The distinction between a "claim" and a civil action" rests on the fact that the civil action may include a "claim" through instituting suit, as opposed to a mere demand made by one person upon another. Where a "civil action" is commenced, setting forth a cause of action stating a duty, breach, accident, injury, damages and proximate cause, AND CLAIMING PLAINTIFF IS ENTITLED TO MONEY DAMAGES AS A MATTER OF RIGHT -- THIS MOST CERTAINLY CONSTITUTES A "CLAIM", and when that action is served upon the defendant, a "claim" through

civil action has then been made upon such defendant, or a civil action ON a claim has been made. And a "claim" means something other than a "cause of action".

Thurston v. U. S. C. A. (Or) 179 F. 2d 514, 515, 516.

BUT AN "action" includes a "claim"

Ehte v. State, 23 NYS 2d 616, 260 APP. Div. 511.

And a "claim" means something other than a "cause of action."

Thurston v. U. S. C. A. (Or) 179 F 2d 514, 515, 516.

Since a minor has neither a "right to claim" or a "right of action", and cannot be a "claimant" and as to him a claim could not accrue until "such claim became a present right or demand", it automatically follows that under the language of 28 U.S.C. Section 2401(b), an action could not be brought on a "tort claim" and a tort claim could not "accrue" to a minor until after he became 21 years of age. Thus Section 2401(b) is impossible to apply to a minor because a claim cannot accrue to a minor until he has capacity to act on his own behalf, or by fiction of law capacity of an adult is "loaned" to him for the special purpose involved.

A complaint is and of itself constitutes a claim (noun) and is an act of "claiming" (as a verb) and thus comes squarely within the meaning of 28 U.S.C. Section 1346(b). It becomes a completed claim in so far as notice to the government is concerned at the time of service of process.

The "right of action" is the right to bring suit; a legal right to maintain an action . . . " (Black's Law Dictionary, 4th Ed. 1488) Under Federal Rule 17c (Appendix F) a minor cannot bring suit excepting through a guardian ad otem with the Court's order and consent. However, when such guardian is appointed, suit and a claim can be instituted. The right of action is the date one can legally act on his own behalf.

Thus, an infant has no right of action, and cannot be a claimant on his own behalf; until the appointment of a guardian under Rule 17c, an infant has no capacity to make a CLAIM (supra) and a claim cannot accrue to him.

It would be inequitable and unconscionable if the appointment of a guardian, an officer of the court, or to act in such a way as to deny a minor his access to a remedy provided for all persons. In fact, again, under the substantive law of the State of

California, it had been held in Doyle v. Lloyd 45 C. A. 2d 493, 497: "The statutes regarding the appointment of guardians ad litem, were enacted for the purpose of protecting the minor, and not for the purpose of precluding them from their legal rights. The defendants cite no cases that hold to the contrary." (Emphasis added)

To state otherwise would be to compound injustice since a guardian ad litem does not represent the child, but represents the Court. (Estate of Cochems, 110 C. A. 2d 27; Serway v. Gallentine, 75 C. A. 2d 86.)

As Chief Justice Warren said in an extra-judicial statement February 9, 1965, in Manila in response to questions of reporters, "People who are impatient with the Supreme Court rulings protecting individual rights should remember that 'the rights of one are the rights of all' and 'the true believer in constitutional government knows that the rights of the most powerful are jeopardized when the rights of the weakest are violated.' There is no one weaker in our government than a child."

D. By United States Law and Court Regulation, a Child Has No Legal Standing or Capacity to Sue.

As to this, please see discussion immediately above concerning Federal Rule 17(a), (b), (c), Appendix F.

Additionally, this Court has recognized in United States v. Williams, 302 U. S. 46, 58 S. Ct. 81:

> "The power of the United States may be exerted to supercede parents' control, and their right to have the services of minor sons who are wanted and fit for military service",

tacitly acknowledging the right of the parents to the services, earnings and "money damages" for a child. In Hoadley v. Chase, 126 F. 818 (affirmed 129 F 1005 MEM, 64 CCA 319), it was held that the government are the parens patriae of a child. The ultimate guardians.

From state law as to substantive rights in ownership, from state law as to procedural handicaps to a child, from Federal law as to the same, it is abundantly clear, that a "claim", i.e., a right of property for money damages, cannot "accrue" to a child until the child becomes 21 - and then it is only for those damages that accrue thereafter, or until by fiction of law, the Court benevolently appoints a legal guardian to represent the

court in the protection of the child.

It must follow, therefore, that "claim accrues" is not the same as "cause of action accrues" as erroneously set forth by the court below, nor can a "claim accrue" to a minor excepting as above. To attempt to superimpose language other than as set forth in the Federal Tort Claim Act, to do violence and injustice to 74,000,000 including the plaintiff, is an absolute denial of the actual intent of Congress, and an arbitrary imposition of inequality and discrimination in the law.

The "stale claims" that the defendants fear, is a fear only in the mind of the defendants, as can be seen in the House Resolution discussions.

With respect to the foregoing, an examination of the court's opinion below, and the District Court's opinion, requires an examination of the cases they have referred to.

THERE IS NOT A SINGLE CASE UNDER THE ANNOTATIONS THAT EXAMINES THE QUESTION OF A "CLAIM ACCRUING" TO A MINOR AS A SUBSTANTIVE MATTER AND UNDER STATE LAW. The cases are remarkable in that they borrow phraseology from statutes having no relationship to the Federal Tort Claims Act, to impose findings in those Acts upon this most unusual Act without prec-

edent. Nearly uniformly they confuse "cause of action" as the phrase in substitution for "claim accrues." They are further noteworthy by the number of exceptions that are rapidly growing in consequence of the construction by some of them that denies equal protection, and denies access to a remedy as intended.

1. United States v. Capital Transit Co., 108 F. Supp. 348 (1952), finds an exception to 28 USC 2401(b) on the ground that in that case the United States waited until two years after an accident happened to bring its action so that when the defendant counterclaimed and the United States took the position the counterclaim was barred by 2401(b) the court expressed the opinion at page 349:

> "It should be borne in mind that the Federal Tort Claim Act should be liberally construed" citing United States v. Yellow Cab Co. 340 U. S. 543.

The court expressed the opinion at page 350 that where the United States had waited more than two years and brings an action:

> "It waives the right to assert the Statute of Limitations against the defendant interposing a counterclaim."

Thus, an exception.

In Levitch v. United States, 114 F. Supp. 572 (1953) it was erroneously held that a "cause of action" accrued to the plaintiff as the basis for applying Section 2401(b). It did not attempt to construe the words "claim accrued." There was no child involved.

In Glenn v. United States, Fed. Supp. 914, Case No. 16031, an exhaustive examination was made by the district court which came to the conclusion that Section 2401(a) was a qualifying clause to Section 2401(b) so that a child could bring an action more than two years after the accident. There was no examination of the words "claim accrues,"; the question was not raised. The case concerned itself with the narrow question of the second sentence of 2401(a) qualifying 2401(b). This case was reversed in Glenn v. United States, 231 F. 2d 884, (by coincidence Judge Chambers (the judge who wrote the opinion in the case below herein) was the judge who wrote the opinion in that case.) Certiorari denied 352 U. S. 926. Despite the language in the present opinion of the court below with respect to its own prior case as authority, Judge Chambers language clearly discloses that there was not that degree of certainty in his previous opinion. At page 886, the court states:

"This court does not choose to place its decision on the grounds that it is clear beyond all argument that Section 2401(b) is not qualified by the tolling sentence in 2401(a). But it is here held THAT IT IS NOT CLEAR THAT THE SENTENCE IN 2401(a) QUALIFIED THE LIMITATION OF TORT CLAIMS SET FORTH IN 2401(b)."
(Emphasis added)

This very narrow opinion should have been limited to the case, instead the dictum of the court in other regards is finding wide circulation, even with the court itself. At page 885, the court itself stated: that the only question before it was whether 2401(b) was qualified by the second sentence of 2401(a). Therefore, it is respectfully urged that the statements of the court below itself in its present opinion relying upon its past opinion, is in and of itself inaccurate. It clearly establishes that in the past opinion, there was no consideration whatsoever of the matter of "claims accrued" or the other constitutional issues raised herein.

In passing, it should be noted that two judges in the Glenn case felt the statute unclear and ruled the two sections were exclusive; however, the third judge dissented and supported the opinion of Judge Mathes in his district court

that 2401(a) was to be construed with 2401(b). From the appellate court opinion, itself uncertain, flowed the opinion of other appellate courts which did not examine the cause as did Glenn.

In Davis v. Foreman, 239 F. 2d 579, concerning the construction of Section 2401(b), no child involved, the case seems to go off on a question of lack of diversity of citizenship, although there is some discussion of the claim being barred.

In Bizer v. United States, 124 F. Supp. 949, (1954), the district court concerned itself with whether state law governed or federal law governed when a "cause of an action" came into existence. It is important to note that a child was not involved. The court held that state law governed to determine the "accrual of a cause of action" and that in that instant case, the claim actually accrued under 2401(b) at the same time as the cause of action, so no harm was done. This has no application to the instant case. In fact, if anything, the looking to the state law to determine the cause of action accruing, is precisely the position of petitioner herein, that is, to look to the state law to determine when a "claim accrues".

Lomax v. United States, 155 F. Supp.

354, did involve a child. However, it is doubtful if the opinion in that case would be the holding today because, in that case, the court stated at page 359

> "this reasoning does violence to the language of the Tort Claims Act, which . . . MUST BE STRICTLY CONSTRUED." (Emphasis added)

Actually, the case involved what might well have been a patent fraud upon the plaintiff, and estoppel should have been held. The court felt and stated that the law should be strictly construed. Later decisions of this court clearly state otherwise and it is to be doubted that a court would give such construction in view of the later pronouncements by this Court as to liberal construction.

In Quinton v. United States 304 F. 2d 234 (1962), there is a sign of the more liberal application of 2401(b). In a malpractice case that did not involve a child, where there was late discovery, we find an EXCEPTION to 2401(b). At page 235, the court states:

> "The primary question in this appeal is whether state or Federal law determines when a 'claim accrues'under 2401(b)."

In reversing the district court, the Court of Appeals held that although the Federal law

determines when a "claim accrues" within the meaning of 2401(b), i.e. from a limitation, not a substantive point, ". . . we look to state law to determine whether any claim has accrued, against the government which would enable the claimant to sue under the Tort Claims Act. In other words, we look to state law to determine whether the plaintiff's action is premature, but to Federal law to determine whether the action was stale." The court then, properly because it involves an adult, discusses "cause of action" under state law with respect to "claim accrued" previously discussed. And rules substantively; that the "claim accrues" as the "cause of action accrues" within the state, upon discovery of the malpractice.

In those cases under the Federal Tort Claims Act dealing with children, we find no determination of the question under state law of a "claim accruing".

Karms v. United States, 186 F. 2d 648 (1951), the court states at page 650:

"The claim accrued, if at all, . . ."

Then, holding that the minor's "cause of action" if any he had, accrued on the date he suffered the injury. However, the court properly stated at page 650:

"This case arose in Alabama and is, therefore, controlled by the substantive law of that state."

We have no way of knowing what it was, or what the court considered. The case actually goes off on different questions because, as it states at page 650:

"The court had jurisdiction and the complaint stated a cause of action, the court erred in dismissing the cause."

United States v. Westfall, 197 F. 2d 765 (1952), is an EXCEPTION to 2401(b) as a two year statute. Action was brought 4 years after the accident. It was an unusual construction of the Claims Act. The court apparently ignored the existence of 4201(b) prior to the 1948 amendment, and because the 1948 amendment contained language that where a claim existed at the time of the enactment there was a period of time thereafter to bring an action, the court allowed the action.

In Foote v. Public Housing Commissioner, 107 F. Supp. 270 (1952), a minor's death was involved. The court limited its holding to the question of whether Section 2401(a) applied to modify Section 2401(b), as in the Glenn case supra. It did not consider the questions in the instant case. It concerned itself with the death

statute part.

Whelan v. United States, 107 F. Supp. 112 (1952) involved a child but did not consider the question of "claim accrues." The case went off on whether 2401(a) qualified 2401(b).

Finn v. United States, 152 F. Supp. 721 (1957) - which refers to the Glenn case, supra, although it involves a minor, again does not consider the question of when a "claim accrues" or the other questions instantly involved. It states at page 721:

> "The narrow question for decision is whether 2401(b) has barred plaintiff's claim for relief because the action was not begun within two years after the accrual of the cause."

again going to the cause of action accruing as distinct from the language of the statute.

Simon v. United States, 244 F. 2d 703 (1957), a case involving a minor does not consider the question of "claim accrued." Like Glenn and Whelan and Finn, supra, it addresses itself to the narro w question of 2401(a) construed with 2401(b). None of these cases consider the constitutional issues raised in this appeal. This case likewise files in the face of later opinions by this court in that the court states that the statute is to be "strictly

construed."

Morton v. United States 185 F. Supp. 211 (1960) involves a minor, and cites the Glenn case, and confines itself to the narrow question of 2401(a) qualifying 2401(b). Additionally, it goes off on the question of "cause of action" accruing without considering this language as being not contained in 2401(b).

None of the other cases cited in the respective opinions or urged by defendants have anything to do with the Federal Tort Claims Act.

This third group of cases could properly be called the "F.E.L.A." cases. Some have been referred to as authority by the courts below in their respective opinions.

Basically, these cases, the Admiralty cases, and the Jones Act cases, arise out of situations where the government created the rights themselves; that is to say, the government legislated rights into existence, stating that certain actions constituted wrongs for which recovery could be had. This is at wide variance with the FTCA whose purpose, primarily, in addition to relieving Congress of multiple bills, was to furnish a forum to substitute for Congress as the forum where theretofore wrongs by the government had been determined and paid. (U. S. v. Yellow Cab Co.

supra).

Additionally, these respective Acts contained statutes of limitation, containing language other and different than Section 2401(b). For example, the Jones Act (Merchant Seamen's Act) 46 USCA Section 688, in the annotations, that the question of the accrual of the right of action or cause of action applied as in FELA cases. Referring then to Title 45 USC Section 56 under Actions-Limitation, we find "No action shall be maintained under this Chapter unless commenced within three years from the day THE CAUSE OF ACTION ACCRUED." Distinctly different from 2401(b) "claim accrues." So too, in the SUITS IN ADMIRALTY ACT Title 46 USCA Section 745 "Suits as authorized by this Chapter may be brought only within two years after THE CAUSE OF ACTION ARISES." (Emphasis added as to both statutes).

The courts have disregarded the difference in the limitations, the intent and purpose of the act and applicability of the same, and have respectively recited them in support or attempted to distinguish them from the present case. Therefore,:

Reading Co., Petitioner, v. Koons, 271 US 58 (1926), a death case. It was determined by

the precise language of Section 6 of FELA which provides

"No action shall be maintained . . . unless commenced within two years from the day the CAUSE OF ACTION ACCRUED." (Emphasis added)

Glus v. Brookly Eastern District Terminal 359 US 321, 3 L Ed. 2d 770, 79 S. Ct. 760 (1959) made an exception to the FELA statute of limitations, an adult was involved, on the basis of estoppel.

Urie v. Thompson, 337 U. S. 163 (1949) a malpractice case, held another exception - that the "cause of action" accrued when the latent injury was discovered. The court held that to find otherwise would constitute "delusive" remedy.

In Frabutt v. New York Chicago & St. Louis RR Co. 84 F. Supp. 460 (1949), a death case where the widow and children were outside of the United States at the time of the death due to war, another EXCEPTION was allowed. The court held that because there was no "access" to the remedy, and therefore even an "administrator" could not file an action, this constituted an exception to the statute of limitations.

The reasonsing at page 466 in that case is

nearly precisely that of Petitioner in the instant case. If one merely substitutes the word "infant" for "non-resident alien" the same result is effected.

In Scarborough v. Atlantic Coast Line RR Co. 178 F. 2d 253 (1949) another EXCEPTION was allowed where there being fraud present, the government was estopped to raise the defense of the statute of limitations.

In that case the court likened fraud as being the means of denying access to the remedy, as being as "effective" in preventing access as was war.

The cases under the suits in Admiralty Act are:

Osbourne v. United States, 164 F. 2d (1947) which involved a minor child. He was a crew member during the war and interned in Japan. He sued four years after injury. The case was dismissed, appealed and reversed. The court squarely held at page 769:

> "All statutes of limitations are based on the assumption that one with a cause of action will not delay bringing it for an unreasonable time; BUT WHEN A PLAINTIFF HAS BEEN DENIED ACCESS TO THE COURTS, THE BASIS OF THE ASSUMPTION HAS BEEN DESTROYED."

That is precisely the position of Petitioner in this case, he has been denied access to the court; the fact that he was denied it by his father doesn't change the situation because the law provides that the father has control. Thus, where the person vested with authority by the law itself denies access, then, "the basis of the assumption has been destroyed.", that "one with a cause of action will not delay bringing it for an unreasonable period of time."

In Williams v. United States, 133 F. Supp. 317 (1954) a Jones and Suits in Admiralty case, the court held insanity did not suspend the statute of limitations. It would be of more than passing interest to raise the question what if the insanity had been the result of the wrong? However, the statute involved in "cause of action accrued".

Under the applicable provisions of the Constitution of the United States, and by reason of the state laws with respect to property, there can be no doubt that as to an infant minor, a "claim for money damages" cannot "accrue" for those damages until age 21 since they belong to his parents; that as to damages after 21 they cannot "accrue" until the damages occur, excepting where, by the legal fiction

of lending him one vested with capacity to act, a "claim accrues: by a guardian being appointed for that special purpose and acting on his behalf. Under the law, and the facts in this case, the "claim accrued" for the permanent damages and injuries to the minor after 21, contingent upon his making proof thereof in court, upon the guardian being appointed and the action being filed concurrently. The action being filed and the claim accruing and being made within two years from the date it "accured" under Federal and state law, the remedy made available to all persons should be made available to this minor, and it is his as a matter of right on a basis equal to those of all other persons, not to be denied by the imposition of restrictions upon him imposed by those who seek to avoid liability. Hearing should be granted by this Court to give guidance to the trial court in the matter of national importance, that, within one four page opinion and judgment, has decided an important state question in a way in conflict with applicable state substantive law; had decided an important question on Federal law which has not been, but should be settled by this Court; has decided a Federal question with respect to substantive law in a way in conflict with the Constitution and applicable decisions of this Court;

and has decided a new question in the words of the court below itself (C.T. 79).

"the question having considerable merit" on an erroneous basis - that "the case law has piled up against Mark", it has not. It has never been raised before.

Sub-Question A, Supra:

It is respectfully offered that hearing is further necessary so that this court shall exercise its power of supervision over the processes of law under Rule 17(a), (b), and (c), (App. F), to see that the minor involved, as well as other minors similarly situated, are not denied due process and theequal privileges and immunities afforded other "persons" under 28 USCA 1346(b) by reason of the fact that the court below refused to take jurisdiction when the courts are the ones that imposed by law the matter of control over access to the remedy.

AS THE SECOND SUBSIDIARY QUESTION, SUPRA

It is respectfully urged that a hearing is necessary so that this Court exercises its supervision in giving effect to the legal fact that by reason of the rules of this Court itself, adopted by this Court pursuant to act of Congress the requirement that a guardian ad litem be appointed before a valid "claim" could "accrue"

under state law, is the basis of a valid, equitable estoppel.

AS TO THE SUB-QUESTION C, SUPRA

It is respectfully urged that a hearing is necessary so that this Court exercise its power of supervision to see that the statutory remedy granted by Congress to all persons, should not as to one class of persons comprising 40% of the population, constitute a "delusive remedy"; in the words of Mr. Justice Cardoza in Woollford Realty Co. v. Rose, 286 U.S. 319 52 S. Ct. 568, 76 L. Ed. 1128 - THE MIND REBELS AGAINST THE NOTION THAT CONGRESS . . . WAS WILLING TO FOSTER AN OPPORTUNITY FOR JUGGLING SO FACILE AND SO OBVIOUS. At page 330.

II

Certiorari Should Be Granted Where, Under The Factual Situation In The First Instance, There Are Two Causes Of Action, Not Separately Stated And Not Demurred To In The Complaint; One Cause Alleging An Action Ex Contractur So As to Come Within A Statute Of Limitations Intended To Apply To "Civil Actions For Money Damages" For Wrongs, But Arising Out of Contract.

Petitioner can offer no authority for this position other than argument and reason. The

original Federal Tort Claim Act, Section 420, provided for "every claim" being subject to the limitation therein. However, this was revised so that today the language is changed and now reads, "Every tort claim".

A tort claim is distinguishable at common law and otherwise from an action for negligence arising out of contract or negligent breach in the performance of contract. Again, based on the cases cited above, one must refer to the substantive law of the state to determine what the cause is. This now has no relation to "claim accrued."

Section 1346(b) specifically applies to all "civil actions" for "wrongs". It does not say tort or limit itself to common law wrongs. There are no words of circumscription.

However, the present language of 2401(b) have application only to "tort claims".

The complaint in this case specifically pleads a landlord-tenant relationship; it alleges the injuries took place in an area provided by the landlord for the use of tenants; every allegation is consistent with a cause of action for negligent breach of a contractual relationship.

Appendix G sets forth the MEASURE OF DAMAGES FOR BREACH OF CONTRACT. They

are the same as the measure of damages for torts at page 17, Appendix G. The two are distinguishable from the standpoint of wherein the wrong arises.

All authority heretofore given with respect to the right of damages up to the age of 21 are equally applicable, as is all constitutional law recited.

In 30 Cal. Jur 2d commencing at page 292 under LANDLORD AND TENANT, we find delineated the liability of a landlord for injuries resulting from the condition of the premises. The entire article as well as the cases cited therein, addresses itself to situations identical to the one in the complaint alleged. There is a particularly strong duty as herein where the landlord retains control of the premises and creates the condition that results in the injury and damage. His liability rises higher than the common law at arms length relationship in ordinary tort actions.

In view of the language of 1346(b) and in the interests of justice, Section 2401(a), which is admittedly a statute of limitations having relationship to all civil "actions" should be applicable as to a cause of action for injuries and wrongdoing and money damages on a claim therefor, arising out of contract as distinct

from one sounding purely in tort.

Assuming that this contention, based upon the substantive and constitutional laws recited, the action being filed within six years from the date of the wrongdoing, it was timely filed.

Hearing should be granted by this Court to determine whether or not this question, never heretofore raised or ruled upon, affecting the substantive rights of the parties and of many others, be granted to give guidance to the trial courts in this important matter.

III

Certiorari Should Be Granted To Settle The Question Affecting 74,000,000 People And Within That 74,000,000 People, 4,000,000 On Different Unequal Basis, As To Whether Or Not They Can Be Denied Access To A Remedy By Reason Of Those Persons Whom The Law Itself Vests With Authority To Come Forward On Their Behalf Refusing To Act For That Period Of Time Provided For As a Statute Of Limitations With Resultant Denial Of Equal Protection Of The Law And The Enjoyment Of Privileges And Immunity Thereunder.

An affidavit was filed addressing itself to the matters in this question. (C.T. 40-50) It disclosed that the parents of the child refused to act either on their own behalf or their own claim

under state law, or on his behalf for future damages that might accrue. Under the Federal rules involved, supra, the state law, they were the persons preferred and designated by the law to act, if action were taken. In the absence of such action or the refusal to act, (with or without valid reason from the standpoint of a stranger to the household), plaintiff proceeds to suffer a denial of access to a remedy. This denial is a direct consequence of the government provisions themselves, and not predicated upon anything the infant has control over. This lack of access is equally applicable to all other of the 74,000,000 children who may or may not have parents or friends willing, able or knowledgeable with respect to acting for them. Access becomes a matter of whim, caprice, and luck, instead of a matter of law.

Again, petitioner addresses himself respectfully to this Court based upon well established principles of equity. There is little that can be added to this question, which overlaps subsidiary questions in the first question.

With respect to the opinion of the court below, it is respectfully to be noted that said court did not meet this argument with citations; instead, the court apparently took judicial notice of questionable "facts" that may well be

considered cynical. It says: "... it may be assumed that it is a rather rare case with the government as an especially choice defendant where the minor's rights are not indicated in a timely fashion." "We would be blind if we didn't know that when there is money around, that just about all of the claims will get to court through guardians ad litem." Petitioner humbly seeks that this language should not be permitted to serve as a springboard for denial of access to a remedy in a situation which in its essence establishes that the language of the court is without foundation, and in itself admits inequality. If this is permitted to stand, it will be cited as law hereafter, and will affect the rights of 74,000,000 as law.

The court below, being the "court below" it is essential that a hearing be granted with respect to such "law" so that under the powers of supervision of this Court, this shall not stand as a means of depriving a minor of his rights under due process. At page 80 of the Transcript, we find that:

> "Congress was alarmed about 'stale claims' when it passed the Act."

It is respectfully urged that no such "alarm" can be found in the House Resolution. The alarm is in the mind of the attorney general who testified,

and is not substantiated by the language of any congressman. This was not even considered anywhere as one of the purposes of the Act itself. Addressing ourselves to this argument, it should be noted in a trial the burden of proof is on the plaintiff; the passage of time works more against the plaintiff than against the defendant because the credibility of his witnesses is placed in question more strongly. There is likewise even a question in the minds of any knowledgeable jury as to why a person waits a long time. There is no validity behind the argument of stale claims; particularly where practically every state in the United States has a statutory provision that a minor has a general statutory period of limitation after the age of 21 within which to act on his own behalf.

Respectfully, and urgently, a hearing should be granted.

IV

Certiorari Should Be Granted Because The Plaintiff Is A Person Under The Fourteenth Amendment And Is Entitled To Access To A Remedy On the Same B asis As Every Other Person Under The Fourteenth Amendment, Unless His Right Is Circumscribed In The Act Creating The Remedy Itself.

Petitioner urges the foregoing upon grounds of equity, as well as the laws heretofore recited. There is nothing to be found in the Federal Tort Claims Act that classifies a minor, by limitation or otherwise, to be treated other and different than every other person with respect to access to the forum.

It is respectfully urged that if he is not treated as a "person" under the Fourteenth Amendment, in view of the lack of restrictive phraseology in the enabling statute, he will be denied equal protection, and the privileges and immunities of other "persons" under the Fourteenth Amendment as well as suffering loss of property without due process of law under the Fifth Amendment.

V

Certiorari Should Be Granted Because Denying Petitioner Access To A Remedy Made Available By Judicial Interpretation And Application Of The Law To Others Within The Same Class Of Persons Upon A Variable, Unequal, Discriminatory Basis, Constitutes A Denial Of Due Process Under The Fifth Amendment, And Equal Protection Of The Laws Under Article IV, Section 2, Calling for The Exercise Of This Court's Power Of Supervision.

The statistics judicially noticed above establish, without question, that at the time of the injury to Mark at age 10, there were 4,220,000 other minors, under like disability in the United States, being under age 21, but over age 19. Although much older than Mark, all of these minors are within the same group of "persons" under the Fourteenth Amendment occupying a like helpless position from a standpoint of legal capacity, and, depending upon the substantive laws of the respective states wherein they reside, their parents owning all damages suffered from injuries up to the age of 21.

Notwithstanding that they are all within one class, under the interpretation and application of 2401(b) given by the courts below as urged by the United States Attorney General, it is a mathematical fact, establishable beyond dispute and therefore judicially noticeable, that there are 730 classes. The 730 classes are arrived at by the number of people whose birthdates coincide with the 730 days between age 19 and age 21. Each group on each birthdate after 19 itself constitutes a class within a class, because in each instance, the number of days past 19 and close to 21 grants the precise equal number of days after attaining the age of 21 within which that person has direct access to

the remedy provided under 1346(b).

Thus, we have inequality within inequality; discrimination within discrimination. Nowhere in the House Resolution nor within the statute itself can we find any language justifying such interpretation or application. The only way that this type of discrimination can be avoided and the intent of Congress to make this remedy available to all persons upon an equal basis can be attained, is by interpreting the words "claim accrued" as words of substance, since they are claims for money damages, within the respective state laws so that the citizens enjoy the privileges and immunities of all other citizens and persons in the respective states and in the United States. By such interpretation and application, all persons are given equal access to the same remedy in accordance with the intent of Congress, and this likewise results in avoiding any petition to Congress by private bill, which was the prime intent of Congress. It is noted in passing that it is unreasonable to believe that Congress intended that 40% of the people should not have the same access as the other 60% when it was the repeated intent of Congress to eliminate all bills for relief and substitute the forum of the district court in place of Congress for all bills for relief.

The law with respect to inequality has been previously considered and is applicable here. A particular phrase in one case, is even more applicable.

> "Arbitrary discrimination between persons in similar circumstances, is a denial of 'due process of law' . . ."

This is set forth in Wallace v. Currin, 95 F. 2d 856, affirmed 59 S. Ct. 379, 306 U.S. 1, 83 L. Ed. 441.

Respectfully, it is urged that certiorari should be granted on this point.

VI

Certiorari Should Be Granted Because Of The Uncertain, Unequal, And Inconsistent Interpretation, And Application Of The Equitable Doctrine Of Estoppel As Applied To The Government In This Instance So That By Such Unequal Application Petitioner Herein Is Denied A Trial On The Merits With Resultant Loss Of Property Without Due Process, And In Violation Of His Right To Equal Privileges And Immunities.

The uncontradicted affidavot of counsel for plaintiff (C.T. 40-50), established that certain representations were made by the United States Attorney General with respect to the applicable provisions of statutes of limitations affecting access to the remedy as provided in 1346(b).

The representations of the United States Attorney General involved were to the effect that 2401(a) qualified 2401(b) in that "like state law" there were two years after attaining majority within which to bring action.

Petitioner is thoroughly cognizant with some discussion with reference to the intent of Congress, "stale claims" and the "alarm" set forth in the opinion of the court below. These, all in error, finding no basis whatsoever in any denunciation by any congressman in the House Resolution, being a matter of the state of mind of the attorney general who testified at that House Resolution Hearing, which he has apparently successfully urged not only upon this Court below but in at least one other instance on another court which adopted his language.

There is not only conflict between courts of appeal themselves with respect to this question of estoppel as against the government, there is even conflict within the decisions of the court below.

In U. S. A. for Use of Black, v. Price - McNemar Construction (C.A. 9th Cir.) (July, 1963), 320 F. 2d 663. The case number in the United States Court of Appeals was 18,429. We find the following:

An agent of a government agency had represe-

nted to Black that the government investigation was not complete, and as soon as it was complete Black could file a claim. Black relied on these representations in not filing his claim within the statutory period of one year provided by law. As in the instant case, the attorney general urged that the representation of the government agent could not toll the statute of limitations so as to estop the government from asserting the same. The action had been filed 18 months after it accrued. The court held: THAT IN STATUTES WHERE A RIGHT OF ACTION IS CREATED, THE PRINCIPLE OF ESTOPPEL DOES APPLY AND CAN APPLY SO AS TO ESTOP THE GOVERNMENT FROM RAISING THE STATUTORY PERIOD OF LIMITATION AS A DEFENSE AGAINST THE UNTIMELY COMMENCEMENT OF THE ACTION.

The judgment of the lower court was reversed.

It is unquestionable that in the present case, the Federal Tort Claims Act creates the right of action within the forum. There was always recognition of the wrong. There was always a cause of action. But there was no remedy - and sovereign immunity was waived in order to make available a remedy. Thus, the right to

the remedy or the right of action was granted by 1346(b).

There is no difference between 1346(b) creating the right of action or the right of access than the case recited above. However,, it is to be noted that three different judges from the same court sat in that than in the instant case. Thus, apparently, different judges of the same court below feel differently with respect to the application of the law. This results in inequal application of the law.

In Munro v. United States, 303 US 36 (1938) an early case on estoppel under the Veterans Act, which did not involve the question of "claim accrues" but which did involve the Tucker Act, it was held the district attorney had no power to waive conditions or limitations. This is a case that precedes the first case cited by 23 years and is a strict application. It is inconsistent with later cases, and should be confined to the particular facts and THE PARTICULAR LAW AND STATUTE IN THAT CASE.

In its opinion, the district court below made an error with respect to the affidavit. (C.T. 65). Apparently, the district court refused to permit estoppel on the ground that the affidavit indicated that the attorney for the Petitioner

"refuses to name" the United States Attorney who had made the representations. This was, at the very least, a misunderstanding by the court of the affidavit, because the affidavit specifically offers (C.T. 49) in paragraph 12 on the said page, to make the name available. The basis for the district court's refusal is lost.

In Hungerford Jr., v. United States, (again 9th Circuit) 307 F. 2d 99, involving the Federal Tort Claims Act, Judge Hamley (who was the judge in U.S.A. For Use of Black, supra) consistently ruled at page 102 on the question of estoppel as against the government:

> "An incorrect representation is a 'misrepresentation' within the meaning of the statute, whether wilful, or based upon negligence in ascertaining the facts presented." (Citing United States v. Neustadt, 366 US 696, 702, 81 S. Ct. 1294, 6 L. Ed. 2d 814).

The above case did not involve a child, it does involve malpractice, and the question of discovery of malpractice constituting the time the "claim accrues" and since this applies to an adult, under the substantive law of California, this is correct.

In 60 Cal. 2d 846, Rand v. Andreatta, et al. the Supreme Court of California recently held

that an estoppel theory is applicable in a suit against a public body. Still under the substantive law of California, this is so.

In Glus v. Brooklyn Eastern District Terminal, 359 U. S. 231, 3 L.Ed. 2d 770, 79 S. Ct. 760, it was held by this Court:

> "We have been shown nothing in the language or history of the F.E.L.A. to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute."

The same language is applicable in this case. There is nothing in the instant statute to indicate that the doctrine of estoppel is inapplicable herein. The Glus case was likewise with respect to an estoppel on a statute of limitations. The court bottomed its opinion on the maxim that "no man can profit by his own wrong".

In The Glus case, the court cites Scarborough supra, with approval. That case, too, held when a suit was brought more than the statutory period of time allowed, that the defendant was estopped to raise the defense of the statute of limitations, the court saying:

> ". . . there is a chink in the supposedly impregnable armor of the substantive time limitations of the Act. If, as to

those cases decided," (referring to Urie, Hungerford and Quentin, all cited supra) "there is one exception surely the infinite variety of human experience will disclose others."

The fact that Petitioner in this action happened to get a court comprised of three judges who believe that estoppel is not applicable, instead of Petitioner happening to get three judges in the same court who believe that estoppel is applicable, is in itself sufficient to establish that there is unequal application of the same doctrine of law, conflict within the opinions of the same court itself, as well as conflict by the court below with other courts, and with the Supreme Court.

Such inconsistency requires that the Supreme Court once again exercise its powers of supervision so as to re-announce and give effect to its own opinion in the Glus case, supra, in the present instance, so that Petitioner will not be denied due process and unequal protection of the laws.

VII

Certiorari Should Be Granted To Determine A Question Never Before Determined, As To Whether The Application of The Doctrine Of Sovereign Immunity With Respect to 1346(b)

In And Of Itself Violates Due Process.

The opinions uniformly cited above establish beyond question that it was the prime intent of Congress, with 20 years of work behind it, to waive the doctrine of sovereign immunity and the immunity of the government to suit in its own courts, so as to give access to a remedy to all persons.

The strained constructions in "unclear" cases, as admiteed in Glenn, supra, so as to maintain and impose this doctrine with the result that a class of persons is denied equal access, is to superimpose this doctrine once again on a statute where it is intended to be waived so that a plaintiff has access to the courts "in the same manner" (28 USC 2674) as others.

The phrase "in the same manner" has been subject to previous examination but not in this Act. In Words and Phrases, Vol. 26, at pages 539 et seq., there are two references to it:

1. "The phrase 'in the same manner' means by the same proceedings so far as applicable to the subject matter. State v. Cook, 14 SW 996, 998.

2. "In the same Manner' refers to way of doing, or to method of procedure." O'Neill v.

Vose 145 P. 2d 411.

It reasonably must follow that in a state where the procedure waives the doctrine of sovereign immunity as to the government, so that the procedure to sue the government is directly accessible to all citizens, that 2674 must have application by way of the phrase "in the same manner". 2674 carefully separates this from "under like circumstances" which has reference, of course, to the question of the wrongdoing.

State of California has repudiated the doctrine of sovereign immunity with respect to tort injuries as a procedural defense or limitation in Muskopf v. Corning Hospital District, 55 C. 2d 211, 359 P. 2d 457. It made an exhaustive examination of the doctrine, reached the conclusion it was inapplicable in a government such as ours, and had neither validity nor application so that as to the State of California, it was no longer the law. But, assuming 1346(b) means what it says, and assuming 2674 means what it says, the United States procedurally is liable in the same manner as a private citizen in the State of California. The same manner would be by direct access to the courts as provided by California law.

However, it is not necessary to consider this

absolutely as a qualification in view of the express intent of the Federal Tort Claims Act to waive immunity; it is urged that wherever possible, wherever there is ambiguity, it should be resolved in favor of the congressional intent to waive sovereign immunity. The legislature decided this, the courts should give courtesy to the express result of twenty years of work.

Therefore, it is respectfully urged, that to take a doctrine which the repeated opinions of the courts, supra, show is ambiguous in determining whether there is a provision of disability or there is not (repeated cases supra where the question arose of the construction of 2401(a) with 2401(b), the language of the Glenn case stating that it is unclear, the fact that it reversed another opinion where the lower court felt the two belonged together), to repeat, to superimpose this doctrine it or to apply it in the face of such ambiguity so as to deny equal protection and result in loss of property to a large segment of the population, files in the face of congressional intent and is inequitable and unjust. Therefore, it is urged that this court exercise its powers of supervision to hear and determine the questions involved, and to make a uniform rule with respect thereto.

CONCLUSION

Petitioner respectfully urges he has established that the basis of the attorney general's defense, the basis of the opinions of the courts below, are founded upon a misunderstanding of who owns a "claim for money damages" in the State of California, and the fact that a "claim accrues" for "future money damages" to a minor under the laws of the State of California, only upon his becoming 21 years of age, or upon the appointment of a guardian ad litem. That they further ignore the fact that a cause of action ex contractu is stated in the complaint, and that the applicable statute of limitations for wrongs arising out of a contract, is other and different than those for a "tort claim," and that a six year statute of limitations therefor is applicable.

It is respectfully urged the Petition for Writ of Certiorari should be granted, the judgment reversed, and the district court instructed to take jurisdiction of the suit.

Respectfully submitted,

FRED OKRAND
EDWARD B. FREED
Attorneys for Petitioner

APPENDIX A

OPINION of the United States Court of Appeals for the Ninth Circuit

Mark Pittman, a minor, by and through his Guardian ad Litem Milan L. Pittman, Appellants. vs. United States of America, Appellee. No. 18,503. Jan. 26, 1965, filed and entered.

Upon Appeal from the United States District Court, for the Northern District of California, Southern Division.

Before: Chambers, Merrill and Dunaway, Circuit Judges. Chambers, Circuit Judge.

Mark Pittman on July 13, 1959, was nine years of age. He was playing in the residential area of a Navy installation at Vallejo, California, and the driver of a Navy motor vehicle ran into him. He suffered injuries.

Suit under the Federal Tort Claims Act[1] was commenced on December 18, 1961, for the minor by his father, Milan L. Pittman. Shortly before the complaint was filed, the latter was appointed guardian ad litem by the district court.

The district court held that 28 U.S.C. Sec. 2401 (b) is applicable and dismissed the action.[2] This appeal followed.

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1 60 Stat. 842

2 210F. Supp. 763

Inpertinent part sec. 2401 (b) reads as follows:

"(b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues..."

If the claim"accrued"on July 13, 1959, and if the foregoing is the applicable section, obviously on the face of things the action was filed too late.

But counsel for the appeallant argues rather eloquently that the claim could not accrue until Mark had a guardian ad litem appointed by the court to pursue his right or until he reached 21 years of age, because there was nothing he could do for himself. He says that a right without a remedy is no right at all and therefore no claim could have accrued. Such argument has considerable original merit and perhaps has been followed in some areas of the law outside the Federal Tort Claims Act. But the trouble is that the case law has piled up against Mark. United States vs. Glenn, 9 Cir. 231 F. 2d 884; Simon v. United States, 5 Cir. 244 F. 2d 703; Carnes v. United States, 10 Cir. 186 F. 2d 648; and Morton v. United States, E.D. Ill. 185 F. Supp. 211. See also Sgambati v. United States 2 Cir. 172 F. 2d 297.

We hold that the cause of action belonged to Mark and not his guardian ad litem, and further

that the cause or claim accrued at the time of the injury, the injury being known to anyone.

Alternately, plaintiff also contends that the six year time limitation of 28 U.S.C. 2401 (a) is applicable. We dealt with that in Glenn, supra, and adhere to our ruling.

Further, plaintiff contends that roughly 40 per cent of the nation's population is under the disability of minority and that to deprive them of rights (because of the possibility that no adult will initiate proceedings) violates due process and equal protection when adults can go vindicate their own rights. We find no cases supporting such a proposition. Further, it may be assumed that it is a rather rare case with the government as an especially choice defendant where the minor's rights are not vindicated in a timely fashion. Plaintiff's argument might have more validity if there were any practical chance that 40, 30, 20, 10 or even five per cent of infants' claims would be lost because of their minority. We would be blind if we didn't know that when there is money around that just about all of the claims will get to court through guardians ad litem. We think that the concept still adheres that the Federal Tort Claims Act was a waiver of government immunity. There are decisions that say that the act should be liberally con-

strued. We think that may be true as to what injuries are within the act. But as to time, one can see that the Congress was alarmed about stale claims when it passed the act and provided that there should be only a period of one year during which an action could be brought. (This was later changed to two years.) This is because of the big thing that government is and because of its difficulty in meeting stale claims. This is particularly true with the military and its shifting personnel. Out of the military operations come so many of the civilian claims. We do not believe that the Congress could have intended that infants have up to 21 years for a statute of limitations.

Plaintiff thinks Muskopf v. Corning Hospital District, 55 Cal. 2d 211, should be followed. Therein the California Supreme Court struck down sovereign immunity for the State of California. We are fully aware of what plaintiff argues, but we fail to agree with his conclusion that if we should pronounce there never was any federal immunity on torts[3] that he would be in a better position. The government could still have its statute of limitations.

Plaintiff also asserts some sort of an

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3 The court is not contemplating such a pronouncement.

estoppel. This was rejected by the district court. It seems that Milan L. Pittman, Mark's father, was a lieutenant commander in the United States Navy stationed at the Navy installation where the accident happened. He says that he had reached a critical stage in his Navy career where he could no longer advance by file on promotion lists but had to be selected. He wanted to be a captain and then an admiral. He dallied with Mark's claim because he feared litigation involving his own branch of the service might prejudice his advancement, the desires for which were natural. After awhile he was advanced to captain. After some months he ascertained his chances to be an admiral, lawsuit pending or not, were nil. Thus he was emboldened to sue for Mark in December, 1961, 29 months after the injury. The alleged estoppel was this: His attorney checked with a government attorney, apparently an assistant United States attorney, as to time and other features of the case. Out of this, his attorney and he were led to believe that July 13, 1961, two years after the date of the injury, was no problem. Federal Crop Insurance v. Merrill, 332 U.S. 380, and Munro v. United States, 303 U.S. 36, simply preclude successfully relying on a waiver of the time limitation or a mistake of the government attorney on the applicable law.

Appellant also bears down heavily on the father's earlier supposed conflict of interest which may have led him to subordinate and thus pass over the interest of the son. Again, on this argument we think the congressional intent is that the congress just did not want stale claims lying around under the Federal Tort Claims Act. Reading Company v. Koons, 271 U.S. 58, is pertinent.

The judgment is affirmed.

APPENDIX B

Judgment.

United States Court of Appeals for the Ninth Circuit.

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and and hereby is affirmed.

Filed and entered January 26, 1965.

PETITION FOR REHEARING Denied April 19, 1965.

APPENDIX C

OPINION Of The United States District Court for the Northern District of California, Southern Division.

Mark Pittman, a minor, by and through his Guardian ad Litem, Milan L. Pittman, Plaintiff, vs. United States of America, Defendant. Civil No. 40400. November 20, 1962.

Upon Motion to Dismiss.

Before Albert Wollenberg, District Judge.

The complaint alleges that plaintiff, a minor child of nine years, suffered personal injuries as a result of the negligence of enlisted personnel of the U.S. Navy, an agency of the defendant, in the operation of a truck within the Mare Island Naval Shipyard at Vallejo, California, on July 13, 1959.

Because the complaint was not filed until December 18, 1961, the government moves to dismiss it as the two year statute of limitations has elapsed. 28 U.S.C. sec. 2401(b). 1/

The government cites U.S. v Glenn, 231 F. 2d. 884 (9th Cir. 1956) for the proposition that even a minor child falls within the limitation of Section 2401 (b). 2/

1/ "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues.

2/ See also Foote v Public Housing Commission 107 F. Supp. 270 (W.D. Mich. 1952) and Whalen v. U.S., 107 F Supp. 112 (E.D. Penn. 1952)

The plaintiff properly points out, however, that the Glenn case, and the cases cited in footnote 2, merely hold that the tolling provision of 28 U.S.C. Section 2401(a) 3/ does not apply to the limitation in Section 2401(b).

Because the limitation of Section 2401(b) is not a limitation of right, as is often held in statutes that create rights unknown to the common law, but merely a limitation of remedy 4/ plaintiff goes on to argue that Section 2401(b) impliedly contains within it its own tolling provisions under certain circumstances. 5/

Since the Ninth Circuit in Hungerford has recognized that a claim, under certain circumstances, can accrue, for the purpose of the statute of limitations, after the tortious act takes place, the issue before this court is whether or not the statute of limitations is tolled when the plaintiff is a minor child? The opinion of this court is that it is not. The general rule is that the exemptions ordinarily granted to infants do not rest on any fundemental doctrine

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3/ " . . . The action of any person under legal disability . . . at the time the claim accrues may be commenced within three years after the disability ceases."

Footnotes from Page 9 Continued -

4/ See U.S. v Southern Pacific ____ F Supp. ____ (N. D. Cal. 1962) (No. 40665, Nov. 16 1962) and U.S. v. Capital Transit Co. 108 F. Supp. 348 (D. D. C. 1952).

5/ In Hungerford v U.S., 307 F.2d. 99 (9th Cir. 1962) the Ninth Circuit held that in a mal-practice suit the cause of action was not barred if brought within two years after it was discovered or could reasonably have been discovered. The action did not accrue when the negligent act was done. In Osbourne v U.S., 164 F.2d. 767 (2nd Cir. 1947) (prisoner of war) and Frabutt v N.Y., Chicago & St. Louis R.R. 84 F.Supp. 460 (W.D.Penn. 1949) (non-resident enemy aliens) the courts held the statute of limitations of the Jones Act and the F.E.L.A., which are quite similar to the statute at bar, were tolled because the plaintiffs had been denied access to the courts.

of law, but on the legislative will expressed in statutes. Infants may be put on the same footing as adults in this respect, and unless excepted they so stand. 54 C.J.S., Limitation of Actions, Section 235 (1948). 6/

Lastly, plaintiff urges the court to apply an estopple doctrine and prevent the government from raising the statute of limitations as a defense. Plaintiff cites Glus v Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959), an F.E.L.A. case. Whether or not estopple can be applied to the statute of limitations in a Tort Claims Act case the court need not decide as plaintiff's affidavit does not present facts sufficient to support a theory of estopple if it did. It is alleged in an affidavit signed by an attorney who states he represented the plaintiff's father, that he did not pursue the claim within the required two year period because: (1) he was advised by an assistant United States attorney who he refuses to name, that the statute of limitations in issue did not apply to minors and that he relied on this advice; and (2) the father was afraid, if he pursued his claim against the government, that he would not get a promotion from the Navy for which he was in line. It is clear that these facts can raise an estopple against no one.

6/ The court in Williams v U.S. 133 F.Supp. 317 (E.D.Va. 1954) aff. 228 F.2d.129 (4th Cir. 1955) cert den. 351 U.S. 986 (1956), recognizing the estopple and unaccessibility to the court theories, would not allow insanity to toll the statute in the Jones Act, likening insanity to infancy.

The motion to dismiss is GRANTED.

DATED: November 20, 1962.

Albert Wollenberg
United States District Judge

Endorsed: Filed Nov. 2, 1962, James P. Welsh, Clerk.

APPENDIX D

JUDGMENT

ORDER Dismissing Complaint and Action and Quashing Interrogatories and Notice of Depositions.

By: Albert Wollenberg, District Judge.

The motion of the defendant to dismiss the complaint and action in this cause for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter of the action and person of the defendant, and to quash the plaintiff's interrogatories to the defendant and notice of depositions as unwarranted and improper without a supporting action, having come regularly on for hearing before the Court; and

The attorneys for the respective parties having submitted memoranda of reasons and authorities and having been heard thereon, and the motion having been submitted to the Court for decision; and

The Court having granted the motion by order dated and entered November 20, 1962,

IT IS HEREBY ORDERED that:

1. The complaint and action be and they are hereby dismissed in their entirety; and
2. The plaintiff's interrogatories to the defendant and notice of taking depositions be and they are hereby quashed.

Dated: November 27, 1962.

Albert Wollenberg
United States District Judge

Endorsed: Filed November 27, 1962, James P. Welsh, Clerk.

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, section 2, United States Constitution

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person .... shall ... be deprived of life, liberty, or property, without due process of law; ..."

The Tenth Amendment to the United States Constitution provides in pertinent part:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

APPENDIX F

REGULATIONS INVOLVED

From the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court of the United States pursuant to Act of Congress of June 19, 1934, Chapter 651.

From Chapter 4 - PARTIES:

Rule 17 "PARTIES PLAINTIFF - CAPACITY" provides in pertinent part:

"(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest, but a ... guardian ... or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is b rought.

"(b) CAPACITY TO SUE ... The capacity of an individual ... to sue ... shall b e determined by the law of his domicile."

"(c) INFANTS ... If an infant ... does not have a duly appointed representative, he may sue by his next friend, or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant ... not otherwise represented in an action, or shall make such other order as it deems proper for the protection of the infant."

APPENDIX G

STATE STATUTES INVOLVED

Sec. 376 of the Code of Civil Procedure of the State of California, provides in pertinent part:

"The parents of a legitimate unmarried minor child, acting jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another." "The respective rights of the parents to any award shall be determined by the court."

"Any such action may be maintained against the person causing the injury. ... The death of the child ... shall not abate the parents' ... cause of action for his injury as to damages accruing before his death."

"In every action under this section, such damages may be given as under all of the circumstances of the case may be just; ..."

The foregoing, as amended Statutes 1961, Chapter 657, page 1868, section 4.

From the Civil Code of the State of California, Chapter 2, MEASURE OF DAMAGES, Article 1, DAMAGES FOR BREACH OF CONTRACT, section 3300:

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the

ordinary course of things, would be likely to result therefrom. (Enacted 1872. As amended Code Am. 1873-74, c. 612, p. 265, sec. 276)

From the Civil Code of the State of California, Chapter 2, MEASURE OF DAMAGES, Article 2, DAMAGES FOR WRONGS, Section 3333:

"TORTS - GENERAL:

"BREACH OF OBLIGATION OTHER THAN CONTRACT. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. (Enacted 1872).

APPENDIX H

UNITED STATES STATUTES INVOLVED

From Title IV - FEDERAL TORT CLAIMS ACT, 60 Statutes 842 to 847 inclusive, codified in 1946 Edition 28 U.S.C. 942 et seq., recodified in 1948 under Title 28 U.S.C., the pertinent provisions being contained in Sections 1346, 2401(b) and 2674, amended September 8, 1959, 78 Statutes 471, Public Law 86-238.

Pertinent parts provide, as set forth in 28 U.S.C. by the revision during recodification:

Sec. 1346. UNITED STATES AS DEFENDANT.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in

cases not sounding in tort.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any negligent employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

The pertinent part of section 2674 provides:

"LIABILITY OF UNITED STATES

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The pertinent parts of section 2401(b) provide:

Section 2401(b) A tort claim against the United States shall be forever barred unless

action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim. (June 25, 1948, ch. 646, 62 Stat. 971; Apr. 25, 1949, ch. 92, sec. 1, 63 Stat. 62.)

From Title 28 U.S.C. Chapter 161, page 5085, UNITED STATES AS PARTY GENERALLY, section 2401(a) provides:

Section 2401. Time for commencing action against United States.

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be

commenced within three years after the disability ceases.

AFFIDAVIT OF PROOF OF SERVICE

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is _____, Los Angeles, California.

On _____, 1965, A. D. I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT on the persons interested in said action by placing THREE true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, to each said persons, in the United States Post Office mailbox at Los Angeles, California, addressed as follows:

1. SOLICITOR GENERAL OF THE UNITED STATES
   Attn. Hon. Archibal Cox
   Washington 25, D. D. (3 copies via Airmail)

2. JOHN W. DOUGLAS
   Assistant Attorney General
   Civil Division
   U. S. Department of Justice
   Washington, D. C. (3 copies via Airmail)

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on _____, 1965 at Los Angeles, California.

_____

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 578

MARK PITTMAN, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 341 F. 2d 739. The opinion of the district court (Pet. App. 8-11) is reported at 210 F. Supp. 763.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1965 (Pet. App. 7), and a timely petition for rehearing was denied on April 19, 1965

(Pet. App. 7). Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including September 16, 1965 (Pet. 2), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the two-year statute of limitations of the Federal Tort Claims Act bars a tort action by a minor for an injury which occurred more than two years before the action was commenced.

2. Whether the United States was estopped to assert the statute of limitations as a defense.

STATUTES INVOLVED

1. The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b).

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b).

A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $2,500, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $2,500 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * *

2. 28 U.S.C. 2401(a), derived from Judiciary Act of March 3, 1911, 36 Stat. 1093, and Tucker Act of 1887, 24 Stat. 505, provides:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person

under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

STATEMENT

Petitioner's complaint, filed on December 18, 1961, alleged that on July 13, 1959, petitioner, then nine years old, was injured when struck by a truck operated by United States Navy personnel in the residential section of the Mare Island Naval Shipyard, California. Alleging that his injuries were caused by the negligence of agents of the United States, he sought judgment in excess of $350,000 against the government.

The United States moved to dismiss on the ground that the action was barred by the Federal Tort Claims Act's two-year statute of limitations, 28 U.S.C. 2401 (b) (*supra*, p. 3). Petitioner opposed the motion on the grounds that his claim did not accrue until the appointment of his guardian *ad litem* and that the United States was estopped from invoking Section 2401(b) as a defense. In an affidavit filed in support of the latter contention, petitioner's attorney alleged that the complaint was not filed earlier because petitioner's father and guardian *ad litem* did not wish to jeopardize his chances for promotion to Captain in the Navy and because petitioner's attorney relied on a statement by an undisclosed Assistant United States Attorney in Los Angeles that the applicable statute of limitations did not apply to minors (Pet. App. 5, 10).

In granting the motion to dismiss (Pet. App. 12-13), the district court noted that the provision for

tolling during disability in 28 U.S.C. 2401(a) (*supra*, pp. 3-4) did not apply to the Tort Claims Act and held that the time period of 28 U.S.C. 2401(b) was not tolled by minority (Pet. App. 9-10). The court also held that the affidavit filed by petitioner's attorney did not present facts sufficient to estop the United States from raising Section 2401(b) as a defense (Pet. App. 10-11).

The court of appeals affirmed (Pet. App. 7), holding that the cause of action belonged to the minor plaintiff and not to his guardian *ad litem* and that the claim accrued at the time of the injury (Pet. App. 2-3). In so doing, the court noted that the claims of minors against the United States are, in the overwhelming majority of cases, presented in a timely fashion (Pet. App. 3) and relied in part upon the congressional policy against entertaining stale tort claims which underlies Section 2401(b) (Pet. App. 4). In addition, the court rejected petitioner's constitutional claims, and held that he could not successfully rely on a waiver of time limitation or a mistake of law by an Assistant United States Attorney (Pet. App. 4-5).

ARGUMENT

The decisions below, holding that the Federal Tort Claims Act's statute of limitations, 28 U.S.C. 2401(b), bars an action by a minor for injuries which occurred more than two years before the complaint was filed, are in accord with the language and purpose of the statute and with prior appellate decisions. There is no occasion for review by this Court.

In contrast with the statute of limitations applicable to claims against the United States under the Tucker Act (28 U.S.C. 2401(a))—which expressly provides for tolling during periods of legal disability—Section 2401(b) unequivocally states that a "tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues." The absence of any tolling provision for legal disability, coupled with the congressional policy against making the United States subject to stale tort claims,[1] make it clear, we believe, that Congress did not intend the tort statute of limitations to be tolled during minority. Every appellate court which has passed on this point has so held. Thus in *United States* v. *Glenn*, 231 F. 2d 884 (C.A. 9), certiorari denied, 352 U.S. 926, and *Simon* v. *United States*, 244 F. 2d 703 (C.A. 5), the courts held that the disability tolling provision of 28 U.S.C. 2401(a) is not applicable to the limitations period under Section 2401(b).[2] And in *Sgambati* v. *United States*, 172

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[1] It is significant that in no statute dealing with governmental tort liability and the time limitations thereon has Congress included a provision for tolling for disability. See Suits in Admiralty Act, 47 Stat. 420, 46 U.S.C. 745; Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 782. Specifically, as to the Federal Tort Claims Act, see H. Rep. No. 1754, 80th Cong., 2d Sess., p. 4; Hearings on H.R. 7236 Before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3rd Sess., p. 21. Petitioner refers to these documents as House Resolutions (Pet. 22-23).

[2] The district court decisions appear to be in accord with these decisions. See *Morton* v. *United States*, 185 F. Supp. 211 (E.D. Ill.). See also *Whalen* v. *United States*, 107 F. Supp. 112 (E.D. Pa.); *Foote* v. *Public Housing Commissioner*

F. 2d 297 (C.A. 2), certiorari denied, 337 U.S. 938, the court held that infancy does not toll the statute of limitations for suits against the United States for maritime torts.[8] As this Court noted in refusing to rule that the statute of limitations on claims for just compensation was tolled by war, "[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276.

Petitioner's contention that a claim does not accrue within the meaning of Section 2401(b) until majority or the appointment of a guardian *ad litem* (Pet. 42-50) is without merit. In effect, this contention is merely another form of the argument—which we have shown has been uniformly rejected—that minority tolls the time period in Section 2401(b). Moreover, as this Court ruled in *Reading Co.* v. *Koons*, 271 U.S. 58, the question of accrual is to be resolved on the basis of practicalities. There, the Court held that a wrongful death action under the Federal Employers' Liability Act accrued at the time of death rather than the time an administrator was appointed, even though the action must be brought by the administrator. As

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of United States, 107 F. Supp. 270 (W.D. Mich.); *Morgan* v. *United States*, 143 F. Supp. 580 (D. N.J.); *Levitch* v. *United States*, 114 F. Supp. 572 (W.D. Mo.); *Finn* v. *United States*, 152 F. Supp. 721 (E.D. N.Y.); *Lomax* v. *United States*, 155 F. Supp. 354 (E.D. Pa.).

[8] See also *Osbourne* v. *United States*, 164 F. 2d 767 (C.A. 2); *Williams* v. *United States*, 228 F. 2d 129 (C.A. 4), certiorari denied, 351 U.S. 986.

in *Koons*, in this case there were identifiable persons who could have "start[ed] the machinery of the law in motion to enforce" petitioner's rights at the time of his injury (271 U.S. at 62). Petitioner's father, who appears to have taken all the necessary steps preliminary to filing suit within two years of the injury (Pet. 14-15), could have easily secured his appointment as guardian *ad litem* within the two-year period provided in Section 2401(b). Moreover, a timely suit could have been filed on petitioner's behalf by a next friend, without the formal appointment of a guardian *ad litem*.[4]

Petitioner also contends that the question of when a claim accrues within the meaning of 28 U.S.C. 2401 (b) is determined by reference to State, rather than federal, law (Pet. 32-48). This question, however, is academic, for under California law, petitioner's tort claim accrued at the time of the injury. See, *e.g.*, *Petrucci* v. *Heidenreich*, 43 Cal. App. 2d 561, 562, 111 P. 2d 421, 422; *Wetzel* v. *Pius*, 78 Cal. App. 104, 107, 248 Pac. 288, 289.[5] The argument that the California law tolling that State's statute of limitations during minority should be read into 28 U.S.C. 2401 (b) is without support[6] or substance. The authorities

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[4] Fed. R. Civ. P. 17(c). The functions of a next friend and guardian *ad litem* are precisely the same. 3 Moore, *Federal Practice* ¶ 1726, p. 1421 (2d ed.).

[5] It should be noted that California Code of Civil Procedure § 352, providing for tolling of the statute of limitations for disability, expressly contemplates that a cause of action has "accrued" in favor of the disabled person.

[6] There is a split of authority on the question whether State or federal law governs the definition of the legal wrong for

previously cited (*supra*, pp. 6-7) for the proposition that Section 2401(b) is not qualified by tolling provisions drawn from Section 2401(a) or implied from common law principles likewise require that the statute not be qualified by tolling provisions taken from State law.

Finally, petitioner contends that his complaint, although sounding in tort, sets forth a contract claim and was therefore timely under 28 U.S.C. 2401(a) (six years) (Pet. 66-69). But the complaint sets forth no facts upon which relief could be granted under a contract theory of recovery. In any event, since the complaint seeks a judgment far in excess of $10,000, the district court would lack jurisdiction were the action viewed as raising a contractual claim. See 28 U.S.C. 1346(a).

2. Petitioner argues that his father's conflict of interests and the alleged misrepresentation of law by an Assistant United States Attorney estop the government from raising the two-year bar of Section 2401(b) (Pet. 46-48, 76-82).[7] But as the court below

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purposes of determining the starting point for computing the two-year period under Section 2401(b). See *Kossick* v. *United States*, 330 F. 2d 933 (C.A. 2); *Quinton* v. *United States*, 304 F. 2d 234 (C.A. 5); *Hungerford* v. *United States*, 307 F. 2d 99 (C.A. 9); *Carnes* v. *United States*, 186 F. 2d 648 (C.A. 10); *Tessier* v. *United States*, 269 F. 2d 305 (C.A. 1). None of these cases suggest, however, that a State tolling provision may be applicable as a qualification on the federal tort claims statute of limitations.

[7] Petitioner's reliance on *Glus* v. *Brookyln Eastern District Terminal*, 359 U.S. 231, is misplaced, as that case did not involve an action against the United States.

correctly held, *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, and *Munro* v. *United States*, 303 U.S. 36, "simply preclude successfully relying on a waiver of the time limitation or a mistake of the government attorney on the applicable law" (Pet. App. 5).[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

DAVID L. ROSE,
Attorney.

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[8] Petitioner also appears to argue that the failure to toll the tort claims statute of limitations during minority amounts to a denial of equal protection of the laws to minors and that it is a violation of the due process clause for the United States to condition its waiver of sovereign immunity differently from the State in which petitioner's claim arose (Pet. 32-34, 69-76, 82-85). We submit that these, and various other constitutional contentions appearing in the petition, are patently insubstantial.

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